United States Court of Appeals

for the Second Circuit

APPENDIX

COURT

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74-1553

United States Court of Appeals

For the Second Circuit.

Index No. 67 Civ. 1137 (RJW).

ILIGAN INTEGRATED STEEL MILLS, INC., CONTINENTAL INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY LTD., ROYAL INSURANCE COMPANY, LTD., FIREMAN'S FUND INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY and AETNA INSURANCE COMPANY,

Plaintiffs-Appellants,

against

SS JOHN WEYERHAEUSER, her engines, boilers, etc., WEYERHAEUSER COMPANY, and NEW YORK NAVIGATION COMPANY, INC.,

Defendants-Appellees-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

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Volume II—Pages 471a to 936a.

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MR. MALOOF: Your Honor, I had subpoenaed New York Navigation Company with documents, but I had not intended to put them on at this stage of the case. But Mr. DeOrchis has asked me if I would for their convenience, and I will do that for their convenience. It might be a short witness to finish off the rest of the day.

THE COURT: First let us dispose of the exhibits to the depositions which you wanted a chance to look at during the lunch hour.

MR. MALOOF: Judge, I did not have a chance to look through all of them because I noticed that there is an awful lot of hearsay testimony and papers in there. They are two big files. I object to them as they are. But if I can look at them overnight, I can agree to most of the papers, I am sure, and no objection to specific papers.

THE COURT: All right.

MR. MALOOF: Thank you, sir.

THE COURT: Very well. We will defer that until tomorrow.

MR. MALOOF: May I take care of one more open item that is still open -- I would rather not wait till the end of my case for this.

I think there is an open motion by Mr. DeOrchis

to substitute the underwriters for Iligan Integrated Steel Mills. I ask the Court to deny that motion and to grant a cross motion to add the underwriters as plaintiffs in the action.

I would like to keep Iligan Integrated Steel Mills in the case. We have sued for $3,000,000. If the damages as proved come to more than the insurance payment, Iligan Integrated Steel Mills would be the recipient of that amount. They must be in the case to receive it. We don't know what the exact amount of damages will be yet.

Is that acceptable?

THE COURT: You were going to look up to see whether or not the insurance company paid pursuant to that policy.

MR. MALOOF: There is no documentation, I am told. They just paid the claim. I do not have copies of the checks yet, but I have the names of the underwriters involved, and they paid about $2,200,000. There are seven companies.

MR. DE ORCHIS: I just have a natural aversion to this game that we play in Admiralty when an underwriter -- now there is no doubt in my mind that Mr. Maloof was retained by the underwriters. He brought it in the name of Iligan. Iligan has been paid off. The underwriter is the only

real party in interest, and we should not have Iligan here. The plaintiff is or is not the underwriter. If the underwriter has been subrogated to the rights of the plaintiff, then the underwriter's name rightfully belongs in the name of the plaintiff and not Iligan -- and that is my point.

MR. MALOOF: This action was brought while the cargo was still in the hold of the ship before Iligan was paid by anybody.

When the action was brought, why, they were the only party in interest. Rule 25(c) says when there is a transfer of interest during the voyage, it leaves this question to the discretion of the Court.

Your Honor, it is quite obvious if we prove damages over $2,200,000 the underwriters won't have an interest in the amount over that amount. Iligan Integrated Steel has it.

Mr. DeOrchis is trying to take technical advantage of that and keep the money for his own client.

What is the difference in having two sets of plaintiffs? We are not going to bill him twice if we win the case -- guaranteed. You can only execute once on a judgment.

THE COURT: Who is the insurance company?

MR. MALOOF: As follows, your Honor:

Continental Insurance Company.

Standard Marine Insurance Company, Ltd.

Royal Insurance Company, Ltd.

Firemen's Fund Insurance Company.

Commercial Union Insurance Company of New York, and

Employers Commercial Union Insurance Company.

There was a change in the name of that company, your Honor --

And Aetna Insurance Company.

Those are the total underwriters, your Honor.

THE COURT: Is it not true that they have the right to sue in the name of the insured?

MR. MALOOF: Under common law, I think they do -- especially when the insured is the only one in interest at the time when the lawsuit is begun.

THE COURT: Do you want to have all those insurance companies named as plaintiffs ? Is that going to help you any?

MR. MALOOF: I have no objection to them as co-plaintiffs.

MR. DE ORCHIS: The case will be known as "et al" after the first name, but the insurance companies should be in there because they have paid the money and they are

going to collectit if there is going to be a recovery -- not Iligan.

If you want to just add them, I would have no objection at this stage to just adding them, and then if it ever turns out that Iligan will ever get a nickel out of this case, we will keep them as plaintiff, but otherwise I will renew my motion.

MR. MALOOF: Fair enough, your Honor. Iligan will not be entitled -- they won't be paid twice.

THE COURT: Suppose the plaintiff recovers a judgment here of $2,000,000, to pick out a figure, what do I have to do -- apportion that among all these insurance companies?

MR. MALOOF: I will do that for you, your Honor. They pay by proportion and they will cover by proportion -- I can get you the figures on that.

MR. DE ORCHIS: That is true. There won't be any trouble about that. The subrogation will show exactly what the percentage of interest is.

MR. MALOOF: In a case of this size, they had a percentage of the loss.

THE COURT: They would be entitled to recover up to $2,200,000, in proportion to their contribution?

MR. MALOOF: Yes.

MR. DE ORCHIS: Yes. In other words, the underwriters have already agreed how they are going to divide any recovery, and there won't be any problem about that.

We do this all the time. Your Honor will not have to decide it. If the plaintiff recovers, then the underwriters will divide it among themselves. You will have nothing to do with that.

THE COURT: Then we will leave it, as I understand it, that we have already struck out Iligan International Corporation --

MR. MALOOF: Yes, sir.

THE COURT: -- as a plaintiff, and we will now add all these insurance companies?

MR. MALOOF: Yes, sir.

THE COURT: It doesn't seem to me to make the slightest difference, but if it makes everybody feel better we will do it in that fashion -- add them as plaintiffs.

All right, now who is the next witness?

MR. MALOOF: New York Navigation Company.

MR. DE ORCHIS: Mr. Grevers.

Your Honor, Mr. Grevers is here pursuant to subpoena given by the plaintiffs.

MR. MALOOF: Did you bring the file with you?

MR. GREVERS: Yes.

A U G U S T H. G R E V E R S, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MALOOF:

Q Mr. Grevers, are you here pursuant to a subpoena?

A Yes, I am.

Q And did that subpoena ask you to bring documentation?

A Yes, it did.

Q Did you bring it, sir?

A Mr. DeOrchis has all of our documentation.

Q Will you tell the Court what your position is?

A I am vice-president of New York Navigation Company.

Q And are you familiar with the subject matter of this case?

A Yes, I am.

Q You know that it concerns a shipment of cargo belonging to Iligan Integrated Steel Mills?

A Yes, sir.

Q And that it went on board the John Weyerhaeuser on December 16, 1966, at Baltimore.

A Correct.

Q And was your company involved in that?

A Yes.

Q Will you tell us in what way you became involved?

A Well, our company entered into a contract with Iligan Steel Mills to transport certain materials to the Philippine Islands, and subsequently we entered into a contract with the Weyerhaeuser Company for the charter of certain of their vessels, of which the John Weyerhaeuser was the first.

Q I show you Plaintiffs' Exhibit 4 and ask you whether this is the agreement that you entered into with Iligan Integrated Steel Mills (handing)?

A (After examining) Yes, sir.

Q Who signed that for your company, sir?

A Ralph Bercovici.

Q Who is he?

A He is the president of our company.

Q Is he still president?

A Yes, he is.

Q Were you involved in the preparation of the contract at all?

A No, I was not.

Q Were you involved in the execution of the contract?

A Yes, I was.

Q By "execution" I mean the fulfillment of it?

A Yes, sir.

Q In what way, sir?

A My department was responsible for the physical chartering of the vessels, the accumulation of the cargo, the loading on board the ship, and the dispatch of the vessel and the voyage to the Philippine Islands.

Q At this time in 1966 did New York Navigation Company own any ships of its own?

A No, sir.

Q So the purpose of this contract being to transport cargo across the sea, was it intended therefore that you would obtain ships from some place?

A Yes, it was.

Q So that you would be able to comply with your duties.

I see that the contract does mention some ships, as a matter of fact, doesn't it? Do I have to show it to you are you familiar with it?

A Yes, it does, that is correct.

Q Now in order to obtain a ship, is it true that you would go about chartering one from a shipowner?

A Yes, that is correct.

Q And did you do so in this case?

A Yes, we did.

Q Do you do that a lot?

A Yes, I do.

Q May I ask you a question, then, about the relationship between a charterer and an owner.

Does the charterer under the usual charter party with a shipowner have a right to go about making changes in the ship and making repairs to make it seaworthy?

A No.

Q What does he do, for instance, Mr. Grevers? I note in clause 1 that New York Navigation agreed to provide Iligan with a sufficient number of suitable and seaworthy vessels.

A Yes.

Q How did you mean to comply with that provision?

A Well, we -- our usual method is by chartering under a standard form of charter party which requires the owner to provide a vessel which is suitable in all respects.

Q So your charter party, the shipowner says that to you, you have satisfied your obligation to the cargo-owner, is that it?

A That is correct.

Q May I conclude, then, that you rely upon the ship-

owner to provide you with a seaworthy vessel?

A Yes, we do.

Q As a matter of fact, it is the shipowner's crew, isn't it?

A It is.

Q May we say for that limited purpose of supplying a seaworthy vessel, for the limited purpose of your supplying a seaworthy vessel to Iligan, that Weyerhaeuser Company would be your agent for that purpose?

MR. WARNER: That is a conclusion, your Honor.

MR. DE ORCHIS: Objection.

THE COURT: Sustained. You are asking him a question of law.

Q You did rely on Weyerhaeuser to supply a seaworthy ship, didn't you?

MR. WARNER: Again I object.

THE COURT: What?

MR. WARNER: I object to that.

THE COURT: He has already answered once. I do not know that it makes it any better to have it answered again.

That is what he said.

Q Who issued the bill of lading in this case, sir?

A The bill of lading was signed, I believe, by --

Q The bill of lading is Exhibit 8, Plaintiffs' Exhibit 8.

I hand it to you to refresh your recollection (handing).

A The bill of lading was issued by Lavship of Baltimore, as agents for the master.

Q How does Lavship enter into the picture?

A Lavship is a steamship agent in the Port of Baltimore. They were appointed by New York Navigation as agent, husbanding agent for this vessel.

Q In other words, Lavship was acting for you?

A Well, Lavship was acting for us on our behalf, yes, that is correct.

Q And you signed as agent for the master, the bill of lading shows?

A Lavship signed as agent for the master.

Q This is pursuant to your charter party.

A Yes, sir.

Q When we use the phrase "issue a bill of lading," is that a word of art in international agreements?

A I am sorry?

Q "Issue a bill of lading," is that a word of art, a specialized word that might need explanation?

A I don't think so.

Q Well, who prepares the description of the commodity on the bill of lading?

A That is customarily prepared by the freight forwarder who is engaged by the shipper of the cargo.

Q And he gives it to the charterer with that information on it?

A To the charterer or his agent, yes.

Q It is not issued yet, is it, at that stage?

A No.

Q It does not require a signature of the charterer?

A It requires a signature, yes.

Q Doesn't the charterer also customarily put certain stamps on the bill of lading?

A Yes, he does.

Q For instance, if it be an on-deck shipment he will stamp "On Deck" on the face of the bill of lading?

A That is correct.

Q And whether it is a "straight bill of lading" and so on; and if there are any other required stamps, who does that?

A Well, that would depend on the nature of the stamp. It might be the shipper's agent; it might be the freight forwarder.

Q I refer you to clause 11, Mr. Grevers, and I

ask you whether New York Navigation did not undertake to stamp the bill of lading in this case with a certain stamp (handing)?

MR. DE ORCHIS: Objection. The contract speaks for itself, your Honor.

THE COURT: Sustained.

Q Would you read clause 11, Mr. Grevers -- out loud, please?

THE COURT: It is in evidence. Now let us not waste time by having the witness read the exhibit.

MR. MALOOF: Well, it only assists the next question. I am not trying to waste time at all.

(The witness hands to Mr. Maloof.)

Q Mr. Grevers, did New York Navigation stamp this bill of lading with the following clause --

MR. DE ORCHIS: Again the bill of lading speaks for itself. Either the stamp is on there or it isn't.

THE COURT: Well, it does not, because we have all had this fuss yesterday about the first copy and the second copy, and one was in the Philippines and nobody knew where the other was, so he is entitled to inquire what he did.

Q Did New York Navigation stamp the bill of lading for this particular shipment as follows:

"All the terms and conditions of this bill of lading are subject to and governed by the written contract entered into between IISMI and New York Nav. for the purpose of this transportation."?

A I do not know, sir. May I see the bill of lading?

Q Yes (handing).

A (After examining) No, sir, they did not.

Q Do you know whether Iligan performed all of the duties it had to perform under the July 11th contract?

MR. DE ORCHIS: Objection, your Honor.

MR. MALOOF: The question is, did he know, does he know.

THE COURT: I will allow it.

(Question read by the reporter.)

A I don't know.

Q Did New York Navigation send them a freight bill?

A Yes, sir.

Q Did Iligan pay the freight?

A Yes, sir.

Q Did Iligan give them cargo to deliver?

A Yes, sir.

Q Did New York Navigation have any quarrel about the amount of the cargo?

A No -- there was some question, but I think it was a very minor one and it was resolved.

THE COURT: May I see that bill of lading, please?

MR. MALOOF: Pardon me, please.

THE COURT: Exhibit 8, I think it is, the bill of lading.

I just want to get Mr. Grevers' testimony straight.

(Mr. Maloof hands.)

THE COURT: We have had a lot of discussion about this thing.

This document, Exhibit 8, is marked "Second Original."

Now there is also one marked "First Original."

Is there one marked "Third Original"?

THE WITNESS: Yes, sir.

THE COURT: Do they all bear the same stamps?

THE WITNESS: They should.

THE COURT: They should.

THE WITNESS: Yes, sir.

THE COURT: So when you say you did not stamp it with the legend that you were asked about, you said that because you did not see it on Exhibit 8?

THE WITNESS: Correct.

THE COURT: So normal practice would be that if it isn't on Exhibit 8 it isn't on the First Original or the Third Original, is that correct?

THE WITNESS: Yes, that is correct.

THE COURT: All right.

Q Now would it help you to look through your file to ascertain whether Iligan performed all of its duties under this contract?

MR. DE ORCHIS: If your Honor please, if he wants me to stipulate something --

What does he mean by "all of the duties"? That is too wide a question. If he means pay the freight bill, we will stipulate.

MR. MALOOF: I said "all of the duties." I did not mean pay the freight.

THE COURT: I will sustain the objection, if there is one, because I think you are asking him for a legal conclusion.

You may ask him what Iligan did, and if you claim that they did not do something that they were supposed to do, maybe you will be good enough to tell me about it at the appropriate time. But all you can ask this man is what did they do.

BY MR. MALOOF:

Q Now what date did Iligan pay the freight to New York Navigation?

A I would have to refer to my file, sir.

Q Would you, please?

MR. DE ORCHIS: What is the question?

MR. MALOOF: Would you read the question, please.

(Question read by the reporter.)

MR. DE ORCHIS: The paid bill is in evidence.

MR. MALOOF: Judge, may I ask that the file be put in front of the witness? It was subpoenaed. Mr. De Orchis is holding it over there peacefully.

THE COURT: We have the freight bill in evidence. I do not know whether it shows the date of payment, and I do not know what difference does it make.

MR. DE ORCHIS: The freight bill is in evidence. It is marked "Paid," and the date is there.

MR. KENNEDY: But that is not the date of its payment.

(Mr.DeOrchis hands to the witness.)

MR. DE ORCHIS: Exhibit 14 ismarked "Paid By New York Navigation Company."

MR. MALOOF: Judge, I move that that remark be stricken. I have a right to investigate with this witness

when actual payment was made.

THE COURT: What is the question -- when the payment was made?

MR. MALOOF: Yes, sir.

THE COURT: Can you answer that?

MR. MALOOF: The actual date.

THE WITNESS: I am sorry, your Honor, I really don't think I can tell you here. Our accounting records would show that. I don't believe that they are in court.

THE COURT: What is the relevance? What difference does it make in this lawsuit as to what date the freight was paid?

MR. MALOOF: If your Honor please, I expect that New York Navigation is going to argue that Iligan made certain waivers of parts of the agreement of July 11th, and I expect to prove that the freight was paid after the shipment left, and the bill of lading was issued at the same time.

Now I do insist on having that fact on the record. I want the day of payment of freight, and if we need the accounting records we will just have to have the subpoena complied with, that is all.

MR. DE ORCHIS: I do not have an understanding but I will stipulate it.

What is it that you want?

MR. MALOOF: That the bill of lading was issued and the freight was paid after the ship left.

MR. DE ORCHIS: I do not know the answer to that. I do not think anybody knows it. When the bill of lading was issued was the day you received it, the day you accepted it. That is when it was issued.

THE COURT: Do you have those records here that refer to the date of payment?

THE WITNESS: No, sir.

THE COURT: Can you get it by tomorrow?

THE WITNESS: Yes, I can.

THE COURT: All right, I will ask you to come back with that.

MR. MALOOF: Thank you.

THE COURT: I will ask you to bring that tomorrow.

BY MR. MALOOF:

Q Did Weyerhaeuser receive any part of this freight that New York Navigation received?

A No, sir.

Q You did not turn over any part of it?

A No.

Q How long have you been in the shipping business, Mr. Grevers?

A About 29 years.

Q Have you been to sea?

A Yes, I have.

Q In what capacity, sir?

A I was a deck officer.

Q Do you think you are qualified to answer a question for me concerning one item of whether or not a ship is seaworthy if certain facts are applicable to it?

A I don't think so. I don't think I am qualified to determine if a ship is seaworthy.

Q Then I won't ask you that.

Before you agreed to accept the John Weyerhaeuser, or your company, you or your company, agreed to accept the John Weyerhaeuser, did you read the prior logbooks?

A No.

Q Did you or anybody else in your company tell Weyerhaeuser Company about this agreement of July 11, 1966, Plaintiff's Exhibit 4?

A I did not. Whether anyone else did, I couldn't say.

Q Who negotiated the charter party with Weyerhaeuser?

A The charter party was negotiated by me.

Q Do you have a copy of it there?

A I do.

Q Would you let us have it, please?

MR. MALOOF: We have one marked for identification, your Honor.

Q I show you Defendant Weyerhaeuser's Exhibit E2 for identification, Mr. Grevers. Is that a copy of the charter party in this case?

A Yes.

Q In the negotiation for this charter party, sir, was there any discussion of the Iligan cargo?

A I believe there must have been.

Q Do you recall what it was?

A No, I don't.

Q I show you paragraph 43 of the charter party and ask you if that will help to refresh your recollection.

A Yes, I remember this.

Q What is that about, sir?

A Well, American flag vessels which were constructed during World War II were then, were at the time of this charter, drawing additional cargo risk penalty, and this clause pertained to such additional penalty.

Q Do you know why they were drawing a penalty?

A The current practice is after a vessel reaches a

certain age underwriters assess penalties.

Q When you say a penalty, on what item of insurance was the item applying, hull, cargo or what?

A Marine cargo.

Q In other words, if you shipped cargo on a vessel of a certain age you had to pay a penalty premium?

A That's correct.

Q And that clause was intended to cover that possibility, is that it?

A Yes.

Q Mr. Grevers, I show you a document of 12 pages, and apparently also a stowage plan attached, and ask you if you can identify that (handing).

A This appears to be the stowage plan of the vessel and the hatch list.

Q Was that prepared by New York Navigation?

A By Navship of Baltimore, yes, on behalf of New York Navigation.

Q Does that cover the Iligan cargo?

A Yes, sir.

MR. MALOOF: Will you mark it for identification.

(Plaintiff's Exhibit 67 marked for identification.)

MR. MALOOF: I offer it in evidence, your Honor.

THE COURT: Any objection?

MR. WARNER: No objection.

MR. DE ORCHIS: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 67 was received in evidence.)

BY MR. MALOOF:

Q Mr. Grevers, I show you a document of three pages entitled "Equipment in Hold No. 2 of John Weyerhaeuser," and I ask you if your company or your agent prepared that? Or do you know what it is?

(Document handed to witness.)

A I don't know what this is.

Q Thank you, sir.

I show you a document, Mr. Grevers, and ask you if you can identify that.

MR. WARNER: May it please the Court, to avoid confusion, I would appreciate it if the document were marked for identification before it were presented to the witness.

THE COURT: Yes, I agree.

MR. MALOOF: I will agree to do that.

Would you mark this for identification, please.

THE COURT: While you are at it, why don't you mark the last one. You showed him something and he said he doesn't know what it is. We might want to know what you showed him at some time in the future.

MR. MALOOF: That is being marked right now, your Honor.

(Plaintiff's Exhibit 68 marked for identification.)

THE COURT: That is the one he doesn't know.

(Plaintiff's Exhibit 69 marked for identification.)

BY MR. MALOOF:

Q I show you Plaintiff's Exhibit 69 for identification and ask you to identify it, please (handing).

A I cannot identify this.

Q Mr. Grevers, did you have occasion --

MR. MALOOF: I withdraw the question.

Q When did you first learn that there was any difficulty on the voyage of the John Weyerhaeuser of December 16th?

A I was on vacation in Florida when, during the

course of a telephone call to my office, I was informed that there was some difficulty with the ship on arrival in Moji, Japan.

Q Do you remember the conversation?

A Well, they said there was some problem, that apparently some water had gotten into the ship, and the ship was in Moji. That is about all I can recall of the conversation.

Q What did you do then, sir?

A I at that point made plans to return to New York but subsequently did not.

Q Were you involved in the investigation of it at all?

A No.

Q Not then or at any time in the future?

A Other than the fact that within our office we were aware of the fact that there was substantial damage, no.

Q Who handled the investigation of the case?

A Allen Harley went to Japan and to the Philippines and Korea.

Q Did he issue a report to New York Navigation?

A I know he made a verbal report. Whether there was a written report, I don't know.

Q Would you check your file, please?

A Yes.

(Pause.)

A No, sir, I find no report.

Q Is that the whole file of your company on this matter?

A Yes, it is.

Q So that if there were a report it would be in that file?

A Yes, sir.

Q So that on this case Mr. Harley gave only an oral report?

A I believe so.

Q Did he make it to you?

A No, sir.

Q To whom would he have made it?

A He would have made it to Ralph Bercovici, our president.

Q Are there any other reports in that file from anybody working for New York Navigation as a result of the investigation of this incident?

(Pause.)

MR. DE ORCHIS: I will object to that question as very broad and apparently Mr. Maloof is trying to

fish. If he wants a particular report or document we will be glad to produce it.

THE COURT: First, I will allow the question to find out if there are any.

A I find a survey report here by Lloyd's agent in Korea, the Hyopsung Shipping Corporation; Lloyd's agent.

Q Would you lay that aside for the moment and see if there are any others.

A There is a report by R. J. Del Pan & Company from Manila, survey taken at Iligan.

Q Is that a Lloyd's agency, sir?

A It does not appear to be.

And I find a survey by the American Bureau of Shipping in Korea, Pusan, Korea.

Q What is the date of that report, sir?

A Dated March 17, 1967.

That's it.

MR. MALOOF: May we mark those for identification?

THE COURT: Yes, you may mark them for identification.

Suppose we make Hyopsung the first one, since that was the first one mentioned.

(Plaintiff's Exhibit 70 marked for identification.)

THE CLERK: 71 is Del Pan.

(Plaintiff's Exhibit 71 marked for identification.)

THE CLERK: Plaintiff's Exhibit 72 is ABS.

(Plaintiff's Exhibit 72 marked for identification.)

BY MR. MALOOF:

Q Could you tell us, looking at Plaintiff's Exhibits 70, 71 and 72 --

MR. MALOOF: Excuse me. I withdraw the question.

Were these surveyors retained by New York Navigation, sir?

A The survey report by Del Pan states that it was at the request of Warner Barnes. Warner Barnes is our agent, so this one would have been at our request.

The -- I can't tell you about the Hyopsung Shipping Corporation. It doesn't say.

The American Bureau of Shipping I believe was not at our request.

Q Limit yourself then to the one who made a survey at the request of your agent. Could you tell us

for what purpose he was retained?

A Well, it is a customary practice in the shipping industry, whenever there is a casualty or an accident or damage, for the parties involved to request a survey to ascertain the facts.

Q Are they also to reach a conclusion as to the cause?

A Yes, they usually do.

Q Will you tell us what conclusion your surveyor reached at your request after investigation?

MR. DE ORCHIS: I have no objection to the conclusion being read, but he keeps saying "your surveyor" like we are bound by a conclusion of a surveyor and I just want to point out we are not. I would object to it if he is making an assertion that this surveyor is our agent. He is independent, just as other surveyors are independent.

I don't know if I have made my position clear, your Honor.

THE COURT: You object to the question?

MR. DE ORCHIS: I object to the question.

THE COURT: You do?

MR. DE ORCHIS: I object to the question on the ground that the conclusion of this surveyor is an

opinion, and the opinion of a surveyor hired by anybody is not binding on the party that hires him.

THE COURT: Was this document listed in the pretrial order?

MR. DE ORCHIS: Surveys, I think -- you mean in the pretrial order?

THE COURT: I get the impression that this is an examination before trial, and we are long past that point. This case has been pending for years and can't be prepared in the courtroom.

Now, the purpose of pretrial is to get out these documents and lay them on the table and state what it is you are going to offer. Was that done with this document or is this a brand new fishing expedition conducted at the last moment.

MR. DE ORCHIS: That is what the objection is.

MR. MALOOF: It is in the pretrial order.

THE COURT: Show me where in the pretrial order you said you were going to introduce documents from the file of this defendant.

MR. MALOOF: I haven't introduced it yet, Your Honor.

THE COURT: Will you be good enough to show

me if there is any reference in the pretrial order to this docuemnt.

MR. DE ORCHIS: It may save time if I remind Mr. Maloof he never moved for discovery and inspection and never served interrogatories, never asking for anything in this case.

MR. MALOOF: We discussed discovery, as you will remember, which is what we do with many admiralty lawyers, but we will do it differently in the future.

Page 4 of the pretrial memorandum:

"G. At the present time plaintiffs contemplate offering into trial some or all of the following exhibits or parts thereof, but hereby reserve their rights to offer additional exhibits which might be necessary to meet any claims of the defendants, as well as to establish the plaintiffs' case."

And No. 3 down from there it says, "Survey reports."

I think it is understood --

THE COURT: It certainly isn't very illuminating.

MR. MALOOF: I think it is understood all the parties have survey reports, especially in a case the size of this one. If I illuminated that any more the

pretrial memo wouldn't have been just five pages.

THE COURT: I sustain the objection.

BY MR. MALOOF:

Q Mr. Grevers, was New York Navigation insured at the time of this casualty?

A Yes, we were.

Q With what company, sir?

MR. DE ORCHIS: Objection, your Honor.

THE COURT: What is the relevance?

MR. MALOOF: We may have to have a direct action against the insurance company. Under the laws of many states that is now possible if New York Navigation is unable to have this much money available.

THE COURT: Sustained.

Q Did you ever make a claim on Weyerhaeuser because of this incident?

MR. DE ORCHIS: There is a cross claim, and there are letters to Weyerhaeuser.

THE COURT: I am aware of the fact that there is a cross claim in the answer.

MR. MALOOF: Is that an objection, your Honor?

MR. DE ORCHIS: You are asking the witness. We made the cross claim, not the witness. We did.

We claimed --

MR. MALOOF: Very often the attorney's claim is not the first one.

MR. DE ORCHIS: You want to know if there were any previous letters?

MR. MALOOF: Yes.

A There was no previous claim.

(Mr. De Orchis hands document to Mr. Maloof.)

MR. MALOOF: Will you mark this for identification, please, letter dated March 29, 1967, from New York Navigation to John Weyerhaeuser.

(Plaintiff's Exhibit 73 marked for identification.)

BY MR. MALOOF:

Q Would you identify this, please?

A This is a letter written by Allen Harley placing the master of the John Weyerhaeuser on notice holding him responsible for damages to cargo.

Q On this voyage?

A On that voyage.

MR. MALOOF: I offer it in evidence.

MR. WARNER: No objection.

MR. DE ORCHIS: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 73 was received in evidence.)

BY MR. MALOOF:

Q Mr. Grevers, was the ship taken off hire in Baltimore in December of 1966?

A I don't think so. I don't recall that it was.

MR. MALOOF: In Defendant Weyerhaeuser's Exhibit EA for identification, which are a lot of papers, there is one which I am showing to the witness to refresh his recollection, your Honor.

Q Does that help you?

A If I understood your question correctly, you asked was the ship taken off hire.

Q Yes.

A Well, we use the term off hire to indicate a failure of the ship to perform and hire ceases for a certain period.

Q Yes. Does that document assist you to recollect? You didn't know yes or no?

A It doesn't help me. There is no off hire indicated on there.

Q Mr. Grevers, were you informed of some engine damage to this vessel at Cristobal?

A I was not personally. I was not in the

office.

Q Was your company?

A Yes, I recall seeing a cable that there was some engine trouble while at Cristobal. Yes.

Q How about Tampa on the same voyage?

A I don't recall.

Q Would there be anything in your file that you ha-e there?

A Yes, there should be.

(Pause.)

A I find references to the breakdown at Cristobal but I don't find anything so far regarding Tampa.

Wait a minute now. Let's see.

I find no reference to it.

Q All right, sir.

Let's go back to that document from Weyerhaeuser, EA for identification, where my question was was there any off hire at Baltimore.

What do these two documents here refer to?

A I didn't look at the second one. The first one is a charter hire payment from January 13th to January 28th. There is an off hire at Cristobal from December 29th to January 13th.

Q What is this December 15th to December 16th?

A "Half time to count," it reads. It must have been some agreement made between our operating people and the owners of the ship that half time would count between December 15th, 1700,and December 16th, 1700.

Q Because it says, "As per agreement" there?

A "As per agreement," yes. I don't know what the agreement is.

Q Would that be put into the off hire bill that way, taken off what you owe Weyerhaeuser?

A Yes, apparently there was a verbal agreement and they paid the charter hire in that fashion.

Q What about this December 16th, 1700, to sailing hour?

THE COURT: What has this to do with the case? I can't spend too much time on this case. What difference does it make whether or not they did something in December with somebody else?

MR. MALOOF: I withdraw the question.

THE COURT: Now, will you please try to limit yourself to something that might have some conceivable relevance to this lawsuit.

BY MR. MALOOF:

Q Would that have anything to do with engine damage at Baltimore, Mr. Grevers?

A It might have.

THE COURT: What's that got to do with the lawsuit?

MR. MALOOF: No further questions.

THE COURT: Will you answer my question?

MR. MALOOF: Yes, sir. It could possibly have something to do with it becauee six hours after the ship left Baltimore she was blowing from the same trouble they tried to repair in Jacksonville, Coos Bay and Wilmington.

THE COURT: Does that have anything to do with water in the hold?

MR. MALOOF: Not that part of the case.

THE COURT: What part of the case?

MR. MALOOF: There was a deviation at Cristobal for two weeks.

THE COURT: There was what?

MR. MALOOF: A deviation for general repairs, a delay of two weeks.

THE COURT: What has that to do with the case?

MR. MALOOF: I want to know if the charterer took the ship off hire in Baltimore because they knew the engines were in bad condition before the ship left, that's all, your Honor. I don't have the proof yet.

I thought it might be in New York Navigation's file, but I haven't gotten it.

THE COURT: I will let you prove anything that could conceivably be relevant. I didn't understand that there was any claim that the engines were defective.

MR. MALOOF: And I wasn't prepared for this witness today, your Honor. I thought he would be here tomorrow. I apologize for delaying the Court a little bit.

If I may, may I ask one more question?

BY MR. MALOOF:

Q Mr. Grevers, was there any notification at Baltimore to support that off hire from December 16th to sailing time which had to do with the engine trouble?

A Was there any notification?

Q Yes. Did know there was engine trouble in Baltimore?

A We may have. I can't answer thatquestion. There may have been engine trouble that caused the delay and the resultant agreement regarding the off hire.

Q Would it be in your other files in your office?

A It would either be in our files or someone in our office may be aware of it.

Q When you bring the information in, the other information about when the freight was paid, could you also check on that for us?

MR. DE ORCHIS: If your Honor please, I am going to object to all of this at this point. The case has been going for two or three years, and now he is asking my man to go back to the office and search for documents which would have been available on discovery and inspection two or three years ago.

THE COURT: I want to know what conceivable relevance engine trouble has to this lawsuit. If you can explain that to me so that I can understand it --

MR. MALOOF: If it please the Court, this ship spent two weeks in Cristobal repairing the main engine. On the way up the East Coast, just a couple of weeks before she left Baltimore, she spent five days in Jacksonville fixing the very same engine; just a few weeks before that she was in Coos Bay where they used plastic steel trying to fix the same thing.

The only thing I was inquiring into was whether or not the owners and charterers knew that the engine had not been repaired yet.

Now, apparently there is some off hire time in Baltimore. Off hire is a deduction from the amount of

money that the charterer gives the shipowner when the ship is delayed for some reason due to an unseaworthy ship which is not the fault of the charterer. The engine trouble would come under this. This is the point of the inquiry. Six hours after the ship left Baltimore the high-pressure turbines are blowing. This is the trouble which she had all the way from the Northwest and all the way around, and it is still happening.

THE COURT: What has that got to do with this case?

MR. MALOOF: It has to do with a delay in Cristobal. And the manner in which they maintained the vessel. There has been testimony about maintenance of this vessel. We have this ship leaking for three prior voyages. If they can't fix the main engines after four tries it bears on that, too, your Honor.

MR. DE ORCHIS: If your Honor please, the pretrial -- I think we ought to read the pretrial order again as to what he claimed. He claimed we wet his cargo because the valve leaked, and that is all this is about. Now we are starting to go into engines and delays that have nothing to do with the damage to this cargo. We

will be here for weeks.

THE COURT: I can't see whether or not fixing the engines, or whether or not there was a delay to fix the engines, has any relevance to the issue of whether or not this cargo was damaged and what damaged it. You don't claim the engines in any way damaged the cargo, do you?

MR. MALOOF: No, sir.

THE COURT: Or that the delay to fix them in any way damaged the cargo.

MR. MALOOF: At this time we have no such claim.

THE COURT: I don't see any point in going into that.

Now, are you through with this witness?

MR. MALOOF: Yes, sir.

Your witness.

THE COURT: Canyou not stipulate,and save him the trouble of coming back, the date when the freight was paid once he looks it up from his records?

MR.DE ORCHIS: We will be glad to do that.

THE COURT: Do that, and that will save him from coming back.

Does anybody else have any questions of this

witness?

MR. MALOOF: Was there a stipulation made?

MR. FISH: He said he would furnish it.

MR. MALOOF: I don't know what the stipulation was.

THE COURT: I suggested, if you would be good enough to listen to what goes on, that in order to save this witness from coming back, Mr. De Orchis stipulate with you the date when the freight was paid, which is what you said for some reason you wanted to know.

MR. MALOOF: Right.

THE COURT: And he says he will do that.

MR. MALOOF: Thank you.

THE COURT: I think that disposes of Mr. Grevers.

How many more witnesses have you got?

MR. MALOOF: I think only one more live witness, your Honor, and a short witness from the other side, a surveyor from London Salvage. One main witness, that is all, and another short one.

THE COURT: All right. Ten o'clock tomorrow.

(Adjourned to July 19, 1972, at 10:00 a.m.)

mkp 447

ILIGAN INTERNATIONAL CORP. and ILIGAN INTEGRATED STELL MILLS, INC.
vs 67 Civ. 1137
SS JOHN WEYERHAEUSER, her engines, etc., WEYERHAEUSER COMPANY and NEW YORK NAVIGATION COMPANY, INC.

New York, July 19, 1972;
10.00 A.M.

Trial resumed.

- -

MR. MALOOF: If it please the Court, last night I looked over these two voyage files which have been marked for identification by Weyerhaeuser. The one which is apparently the Madres file -- for two voyages before, the plaintiff objects to the introduction of this file on the ground that it is filled with letters, hearsay and duplications, and nothing which really bears on the facts in issue in this case, the unseaworthiness of the ship.

THE COURT: What exhibit is that?

MR. MALOOF: That is Exhibit E-1 for identification.

Plaintiff has no objection to the other voyage file, E-8, except to say we should identify the papers in it somehow. They are all loose, a lot of duplication. I do not know how he can do it, but I have no objection to it because it is the Iligan voyage.

THE COURT: And how about the other exhibits?

MR. MALOOF: I think that is all -- we had two.

THE COURT: There were a number of exhibits.

MR. MALOOF: Oh, the voyage charters are in here, in Exhibit E-8 for identification. I think we introduced the logs ourselves.

Does Weyerhaeuser offer the Watts survey report also?

MR. WARNER: Yes.

MR. MALOOF: We have no objection to E-11; the voyage charter is E-2 for identification, no objection.

We object to the group of survey reports and ABS reports that apparently have been offered for identification as E-10. It is just impossible to cross-examine those people because they are not here. We do not know who made the reports or anything like that. Plaintiff objects to E-10 for identification.

THE COURT: So it is Exhibit E-1 and Exhibit E-10 so far.

MR. MALOOF: Yes.

THE COURT: No objection to the others?

MR. MALOOF: Also E-9 is apparently the crew list -- we have no objection to that going in, although we do not see the relevancy.

No objection to E-7 for identification, which is a statement of facts, Baltimore.

No objection to E-6 for identification, which is the stowage plan, Baltimore; also attached is the stowage plan, Tampa -- no objection to either one, your Honor.

No objection to E-5 for identification, a letter from Captain Balkunas to Captain Dumble.

No objection to E-4 for identification, a letter from Weyerhaueser to Captain Dumble.

No objection to E-3 for identification, a letter from Weyerhaeuser to Captain Dumble.

It is just the two, your Honor, E-1 and E-10.

THE COURT: I will receive all the others except E-1 and E-10.

Will you let me look at those, please?

(Handed to the Court.)

(Defendant Weyerhaeuser Exhibits E-2, E-3, E-4, E-5, E-6, E-7, E-8, E-9 and E-11 received in evidence.)

THE COURT: (After examining) As far as E-1 is concerned, the only reference I see to that in the deposition of Mr. Mandle appears on pages 25 and 26 in which this batch of papers was marked for identification.

The witness said: "I would call those agent's

reports, correspondence and documents relating to cargo discharge at Madres.

"That would probably be a charter file, where it came from, voyage file."

This is a heterogeneous mass of documents.

Do you want to be heard on the admissibility of those, Mr. Warner?

MR. WARNER: Your Honor, these were records which were kept in the normal course of business by Weyerhaeuser. They were produced at the express request of the plaintiff in this case. They were marked for identification at the express request of the plaintiff in this case. They are plaintiffs' exhibits at the deposition.

THE COURT: Is there testimony to the effect that they are documents kept in the regular course of business? I do not find any.

MR. WARNER: Page 26, he says it is an operation manager's file. That is a question put by Mr. Kennedy at the top of page 26 -- agent's reports, correspondence relating to cargo discharge.

I say it is relevant and material because there has been an allegation here that the cargo was soaking wet in Madres.

MR. MALOOF: May I be heard, your Honor?

THE COURT: It would have to be more concisely defined and limited than just a batch of documents. There is no testimony about them at all except the witness said, "I would call these agent's reports *** That would probably be a charter file, where it came from" -- whatever that means.

I am going to sustain the objection to this blanket offer of E-1.

You are at liberty to offer any documents in it later on when you lay a proper foundation for it.

Now E-10.

(After examining) As to E-10, the only reference to that in the deposition that I find is on pages 51 and 52 The question was asked:

"Do you have any reports with you that were issued by the surveyors and other people that you may have --"; and then a whole batch of 23 reports were marked one exhibit, and that is all I see about it.

I am going to sustain the objection to that. I do not think we ought to encumber this record with a great mass of papers which are not really identified and about which we know nothing except somebody marked them at a deposition somewhere.

So I will sustain the objection to those; and,

again, if you want to offer any of those reports you may do so on a proper foundation.

Now what do we have in?

THE CLERK: Defendant Weyerhaeuser Exhibits E-2 to 9 and Exhibit E-11 received in evidence.

THE COURT: Now we have a piece of unfinished business about when the freight was paid.

MR. MALOOF: I think Mr. DeOrchis was to come up with that.

MR. DE ORCHIS: I have not heard from the witness yet, your Honor. He was going back to the office to check his files to give us the information in a letter.

THE COURT: All right, go ahead.

MR. MALOOF: If it please the Court, to clarify the record a bit, Madam Clerk informed me this morning that the clerk downstairs would like perhaps the caption of the case clarified because of the stipulation and your Honor's rulings on the record.

I personally think the rulings on the record are sufficient, but I like to keep the clerks happy as much as I can.

Do you think it is necessary to put in an amended complaint to conform to the rulings made in open court, your Honor?

THE COURT: I would not think you had to file an amended complaint. What we did was to add as parties plaintiff a number of insurance companies at the defendants' request and without objection by the plaintiff.

I do not see why you cannot make a note of that in the minutes and refer to it hereafter by its new title.

MR. MALOOF: Thank you, sir.

Plaintiff calls Captain deBouthillier to the stand.

A L A I N d e B O U T H I L L I E R, called as a witness on behalf of theplaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MALOOF:

Q Sir, would you tell the Court what you do for a living?

A At the moment I am associated with the firm of Francis A. Martin & Ottaway.

Q And what kind of firm is that, sir?

A This is a firm of marine consultants, surveyors and shipping agents.

Q And are you one of the consultants with that company?

A I am,sir.

Q In what field are you consulted, sir?

A In the field of navigation, cargo, stevedoring.

Q Are you familiar with that field?

A Yes, sir.

Q Will you give the Court some of your background to demonstrate your familiarity with that field, sir?

A I have been at sea. I served successively as -- first, I am a graduate of the Merchant Marine Academy, Kings Point. With Farrell, I served at sea successively as third officer, second officer and chief officer.

I am a graduate of Georgetown University. I served with Farrell Lines as assistant port captain, then assistant marine superintendent, then assistant to the executive vice president. I then served for a period of some four years as general operating manager of Peninsula Navigation Corporation, a firm that operated American and foreign flag vessels in the tramp trade.

I was then with the Grace Line, first as assistant to the president, then as assistant vice president and general traffic manager, and for the last three years as vice president in charge of marine operations.

Q How many years altogether was the period of time you are talking about?

A Thirty years.

Q Did I ask you to prepare a document with that experience on it, sir?

A You did, sir.

Q I show you a document and ask if this is what you prepared for me?

A Yes, sir, it is.

MR. MALOOF: Mark it for identification, please.

(Plaintiff's Exhibit 74 marked for identification.)

Q Have you had positions which required you to supervise port captains?

A Yes.

Q And marine superintendents?

A Yes, sir.

Q And masters of vessels?

A Yes, sir.

Q And in your position were you called upon to analyze their conduct?

A Yes, sir.

Q And to make judgments thereupon?

A Yes, sir.

Q And to make recommendations to hire and fire such people?

A Yes, sir.

MR. MALOOF: I offer Plaintiff's Exhibit 74 in evidence.

MR. DE ORCHIS: Objection.

THE COURT: I will receive this as a substitute for the witness' oral testimony as to his education and experience. He could sit here for the next 25 minutes and read this off, but I don't see that that is necessary. You can cross examine him about it, if you want to.

I will receive it on that basis.

(Plaintiff's Exhibit 74 was received in evidence.)

xx BY MR. MALOOF:

Q Captain -- is "Captain"a proper appellation for you, sir?

A Yes, sir.

Q Captain, in your career have you had to read logbooks as part of your position?

A Yes, sir.

Q Do you consider that you are able to analyze deck

logs and engine logs as a seafaring person should?

A Yes, sir.

Q And a man in the shipping business?

A Yes, sir.

Q Did I ask you to consult with me about a case involving the shipment of cargo belonging to Iligan Integrated Steel Mills on the SS John Weyerhaeuser on December 16, 1966, from Baltimore to the Philippines?

A Yes, sir.

Q And did you say you would consult with me?

A I did, sir.

Q Did you come to my office?

A Yes, sir.

Q Did I ask you to study various documentation?

A Yes, sir.

Q Did that documentation include certain logbooks?

A Yes, sir.

Q Did it include a logbook covering a shipment of fertilizer from Hopewell, Virginia to Madras, India, starting at Hopewell in June of 1966?

A Yes, sir.

Q Did it include the engine log for that same voyage?

A It did.

Q Did it cover both such logs for the ballast voyage from India to the West Coast of the United States?

A Yes, sir.

Q Did it also include both logbooks from the West Coast through the Canal and up to the East Coast with the lumber belonging to the Weyerhaeuser Company?

A Yes, sir.

Q Did it also include both logs covering the Iligan voyage itself, sir, from Baltimore to Moji, Mokpo, back to Moji, to Iligan?

A It did.

Q Did you study those documents?

A Yes.

Q Did I give you depositions of Captain Dumble, Mr. Mandle and Mr. Baumgartner?

A Yes, sir.

Q Did you read them?

A I did.

Q Did you study them?

A I did.

Q Did I give you other documentation also, sir?

A You did.

Q Did you study it?

A I did.

Q Did I ask you to prepare a chart based only upon the logbooks for the three voyages I have mentioned which would show the sounding records, the pumping records and the drafts on the three voyages?

A Yes, sir.

Q Did you prepare such a chart?

A I did, sir.

Q I show you a document and ask you if this is the chart you prepared (handing to witness).

A Yes, sir. This is the chart I prepared.

Q Is that an accurate chart from what you saw in the logbooks?

A Yes, sir, with one exception. The date of July 8th should be July 9th.

Q Would you take a pen and make that change now, sir.

A Yes, sir.

MR. MALOOF: Mark it for identification.

(Plaintiff's Exhibit 75 marked for identification.)

MR. MALOOF: If it please the Court, this chart

is the original chart of the one -- the smaller copy, the Xerox copy, is Appendix A in plaintiff's pretrial brief. I offer it in evidence as an assistance to the Court so that you may not have to go through all the log-books.

MR. WARNER: Weyerhaeuser has no objection to the chart itself, but it does not concede the truth of its contents.

MR. DE ORCHIS: The same thing. I have no objection to the chart, but I haven't even checked it to see that it is correct.

MR. WARNER: For the record, may we have a larger one?

MR. MALOOF: I apologize for the small one in the brief and I will give the attorneys a full-size copy, your Honor.

THE COURT: I will receive it in the same way that I would receive a chart prepared by an account-ant, as an aid to me in going over the actual evidence, which is the logbooks themselves. It is subject to correction. If defendants claim it doesn't accurately reflect the information on the logs I assume they will bring that to my attention before we are through.

(Plaintiff's Exhibit 75 was received in evi-

dence.)

BY MR. MALOOF:

Q Incidentally, Captain, Mr. De Orchis yesterday made a chalk drawing on this blackboard in court which still remains here. Does that look to you like any Liberty ship you have been aboard?

A No, sir, I am afraid it doesn't.

Q Is the tank top of the No. 2 and 3 lower hold slanted like that?

A No, sir, the tank top is parallel to the top tier.

Q It is straight, isn't it?

A Yes, sir.

Q There are some dashes over here over the representation of the bilge well. Would you think it would be fairly unusual to see water standing up like that?

A Well, sir, that is not in scale, that representation, just from the depth of the bilge well alone in relation to the rest of the drawing. Water would -- if the vessel were on an even keel -- that is, drawing as many feet at the forward end of the vessel as at the after end of the vessel -- any water above the bilge well -- and that, I assume, is water that has backed up from the

bilge well, overflowed from the bilge well -- were the vessel on an even keel, if there were six inches of water at the after bulkhead there would be six inches of water at the forward bulkhead.

Q You are talking about six inches over the bilge well?

A Using six inches as an example, yes.

Q And then any variation would depend upon the drag of the vessel, isn't that true?

A It would depend upon the trim of the vessel. Where the vessel trimmed by the stern, which is known as drag, and which is usual, there would be more water in the after end of the hatch than there would be in the forward end of the hatch.

Q And the drag is variable, isn't it?

A It certainly is, sir.

Conversely, if the vessel were down by the head there would be more water in the forward end of the hatch than there would be in the after end of the hatch.

Q And where the water would be even in relation to the drag might it not also depend on the length of this common hold?

A Well, yes, it would, of course. Yes.

Q Does a ship at sea ride, say, in the middle

of the Pacific Ocean, just ride evenly without pitching or rolling or anything?

A No, sir. There is always a certain amount of motion in a vessel at sea.

Q Do you need heavy weather for a ship to pitch?

A No, sir.

Q If a Liberty ship were pitching and there were some water aft of the No. 3 lower hold what effect would that have on the water when the ship pitched forward?

A It would have a tendency to flow forward with the pitch forward.

Q The testimony in the case is that these dots in the middle are a nonwatertight wooden bulkhead.

A Yes.

Q Perhaps with some burlap there. The water would go through that, I take it?

A It certainly would.

MR. DE ORCHIS: Objection to leading. We are hearing the testimony from Mr. Maloof rather than the man on the stand.

THE COURT: Don't lead him.

Before we go further, I am going to ask you with respect to Exhibit 75, which is your chart, every page is headed "PS." Does that mean port side?

THE WITNESS: No, port and starboard. "P" stands for port and the "S" stands for starboard.

THE COURT: So you have them both in there?

THE WITNESS: Yes, sir.

THE COURT: I am glad I asked you that. I thought it meant port side.

THE WITNESS: No, sir.

THE COURT: All right.

BY MR. MALOOF:

Q Captain, having studied the logbooks -- and, incidentally, you are allowed to have a copy of that chart in front of you if you wish --

A Thank you, sir.

Q -- were you able to come to some conclusions from the logbooks on the condition of this vessel with special reference to the entry of water into the No. 3 lower hold over those three voyages we spoke about?

A Yes, sir.

Q Would you tell the Court what conclusions you reached?

A I reached the conclusion that the vessel was experiencing a substantial and recurring problem with water entering the No. 3 hold from an unknown source.

Q Were you able to come to some conclusion from

the logbooks as to when this entry of water may have begun?

A Yes, sir. My conclusion was that very probably this problem began at least at the inception of the voyage from Hopewell, Virginia to Madras, but that it very definitely became apparent that there was a substantial problem about the 3rd of August, 1966, when the vessel was arriving at Madras, India.

Q Now, when you say problem, could you be more specific, please?

A Yes, sir. The logbooks indicate -- and I am talking now, if I may, of the Hopewell, Virginia to Madras, India portion of the voyage -- the engine room logs in particular indicate that there was water continuously entering the No. 3 hold from August 5th or August 6th, really, right straight through to September 6th. The engine room log indicates that the No. 3 compartment, beginning with the port bilge and then changing to the starboard bilge, about the 14th of August, but the No. 3 compartment would pump almost continuously, once every watch, which is a very unusual occurrence.

Q Studying the logs from the Madras voyage on through the ballast voyage back to the United States and the lumber voyage, and for the period while the ship was

in Baltimore, were you able to conclude whether or not the entry of water was progressive or not?

A The entry of water from the time the vessel sailed from Madras to Portland in Ballast, via Singapore for bunkers, the deck logbook does not indicate any substantial amount of water in No. 3. In fact, throughout it is under seven inches, with the exception of the day the vessel sailed from Madras, when it was 16 inches in the starboard bilge well, both a.m. and p.m.

However, the engine room log notes the pumping of No. 3 port and starboard, No. 3 port, on various occasions during that voyage, and particularly on the 13th of October, while the vessel was still at sea, there is an entry in the engine room logbook, and I will quote the entry:

"Pump No. 3 port cargo hold bilges (bridge) 1405."

This is an odd entry in an engine room log, it is an unusual entry, and it would indicate that one of the officers on watch, or the master or the chief officer, but some deck officer, called the engine room and ordered them specifically to pump that particular bilge.

For that same day, however, in the deck logbook, under the bilge soundings, they show zero inches in

the port and starboard bilge, both a.m. and p.m.

The peculiar entry in the engine room logbook, coupled with the absence of water as shown by the deck logbook, leads me to believe that they had a continuing problem in No. 3, and it was not being reflected in the deck logbook.

T3

Q Do the logs indicate that the problem was of a progressive condition?

A From Portland, Oregon, as I say, the logbooks, apart from that entry, would seem to indicate that the condition was less progressive from Madres to Portland than it was during the month -- better than a month that the vessel was pumping bilges almost every watch.

On the voyage from Portland around to the East Coast with lumber, certainly the indication there is that the entry of water into No. 3 hold was progressive and continuous.

Q Now consider in context of that same question the log from Baltimore to Iligan, the question of whether the entry of water was progressively worse and worse.

A Yes, on the voyage from Baltimore to Iligan, or I should say to Moji --

Q Yes, I will amend my question to say "Moji" -- I am sorry.

A -- the evidence in the logbook -- and I am talking now more of the deck log than the engine log -- the evidence in the logbook is that the condition was getting not only progressively worse, but completely out of hand.

Q What is the purpose of logbooks, Captain?

A The purpose of logbooks are to furnish a running

account of the voyage, a diary, if you will, of the voyage day by day, and tonote that these logbooks generally, whether the engine or deck -- to note any unusual occurrence, both usual and unusual occurrences during the voyage.

In the case of the deck log specifically, entries are made concerning the direction and force of the wind, the state of the sea, the courses which the vessel is following, both by gyro compass and by standard steering compass; the deviation in the compass; the barometric pressure -- a whole series of entries of that type, plus a "Remarks" column, watch by watch, which states any occurrence during the watch.

There is also provision made in the deck log for certain navigational observations, fixing the vessel's position at noon, together with the distance run, the fuel oil consumed, freshwater consumed, fuel oil on hand, freshwater on hand.

In the case of the engine log, the temperature and pressures of the various machinery and parts of the vessel are noted; the engine revolutions are noted.

There is a provision for "Remarks" column, where the engineer on watch indicates anything of an unusual occurrence taking place during the watch, and also notes the times that he pumps the settler -- something

tanks from the doublebottom or other fuel oil tanks in the vessel, that he pumps them -- things of that nature.

Q Are the bilge soundings and the pumping records important as anything else in the logbooks?

A They are, sir.

Q For whose purpose are logbooks kept?

A Logbooks are kept generally for the purpose of the owners of the vessel so that they may review them at the end of a voyage and determine how the voyage progressed and how the vessel performed.

Q Are they kept for the purpose of anybody on board the ship also?

A The rough copy -- one copy of the deck log and one copy of the engine log is always retained on board the vessel.

These logbooks, I should add, in the case of the deck logbook, the officer on each watch initials and signs the entries for his watch, and at the bottom of the page the chief officer and the master sign the logbook each day.

Q The master signs every day?

A The master signs usually the day after, the morning after the preceding day, after the last entry in the log.

Q But he signs every day?

A He signs every day, as well as the chief officer.

Q From your experience and from your study of the documentation in this case is there any doubt in your mind that the master of this ship knew that he had a problem on the Madras voyage?

MR. DE ORCHIS: Objection, your Honor. It calls for the operation of his mind.

THE COURT: I will allow it.

A There is no doubt in my mind, sir.

Q Is there any doubt in your mind, sir, that the captain of this ship knew that the ship leaked while it was in Baltimore?

A There is no doubt in my mind, sir.

Q Is there any doubt in your mind, sir, on the assumption as does appear in the depositions, that the marine superintendent and the port engineer in San Francisco read at least the Madras log, that they knew that there was a problem on that voyage?

MR. DE ORCHIS: Objection, your Honor.

THE COURT: You are asking him to characterize whatever the deposition says.

MR. MALOOF: I will take out my reference to the deposition. The only reason it was in, your Honor, was because the testimony is that he read the log.

THE COURT: Then that is the testimony.

MR. MALOOF: May I rephrase my question, your Honor?

THE COURT: Yes.

BY MR. MALOOF:

Q Captain, assume that the marine superintendent of the Weyerhaeuser Company, Harold Baumgartner, read the log on the Madras voyage, the deck log -- what log does the marine superintendent read?

A In the case of Mr. Baumgartner his title was marine superintendent.

Q Yes.

A But his function was actually that of a port engineer.

Q What log?

A He would have read the engine room log.

Q Then I will rephrase my question.

Assume that he read it on that Madras voyage, is there any doubt in your mind that as a marine superintendent he would know that there was a problem on that voyage?

A There is no doubt in my mind.

Q Now assuming that Mr. Balkunas as the port engineer of Weyerhaeuser read the deck log, is there any doubt in your mind that Mr. Balkunas knew there was a problem?

A I think Captain Balkunas was the port captain, sir.

Q I will accept that amendment, then.

A Had he read the deck log for the Madras voyage he certainly know that there was a problem there.

Q Are you familiar, Captain, with charter parties?

A Yes.

MR. MALOOF: I will withdraw that question and come back to it later.

Q Captain, in connection with what we are talking about, what is the important thing? Is it the water in the ship alone that is important, just the fact that there is a certain number of inches over the bilge well --

MR. DE ORCHIS: Objection, your Honor.

MR. MALOOF: I haven't finished.

MR. DE ORCHIS: Your Honor, this is going to be a leading question -- I can tell from the beginning.

THE COURT: Well, let him finish.

MR. DE ORCHIS: All right.

Q You have made certain conclusions, Captain.

Now in discussing the basis for your conclusions what was more important to you, the depth of the water as recorded in the sounding records or the fact that the water kept recurring?

A The fact that the water kept recurring.

Q Captain, Captain Dumble testified in this case that when the ship was in Cristobal he tasted the water in the No. 3 lower hold.

Now he also testified that he had blown out the No. 3 lower hold with the trisodium phosphate, about 3000 tons, right up to the escape hatches so that nobody could get into the No. 3 lower hold.

Can you give us your opinion on how he could have tasted the water in the No. 3 lower hold bilge well?

A Yes, sir, I can. The only way that he could have tasted that water was on the end of the sounding rod that the carpenter was using to sound the No. 3 bilge.

Q In your opinion is that a very effective test to determine fresh or saltwater?

A No, sir, it is not a very effective test to determine fresh or saltwater.

Q I show you, Captain, Weyerhaeuser Exhibit 2 for identification, which is the charter party in this case (handing).

Are you familiar with such charter party, sir?

A Yes, sir.

Q Under it -- in other words, you have chartered vessels on both ends, have you?

A I have chartered vessels.

I do not understand what you mean by "both ends."

Q As owner and charterer both.

A No, sir. I have chartered vessels only as owner.

Q You have given them up on a charter?

A Well, I must change that. I have on one occasion chartered a vessel as a charterer, yes, sir.

Q Does a charterer have jurisdiction over the ship in the sense that he is the one who makes it seaworthy?

A No, sir.

MR. DE ORCHIS: Objection as to form, calling for a legal conclusion.

THE COURT: It does; sustained.

Q In your experience as a shipowner who has chartered a vessel, what is the custom as to who is responsible for providing a seaworthy ship for the cargo?

MR. DE ORCHIS: Objection.

THE COURT: I suppose custom does not override the terms of the agreement.

I think he is going to say that the charterer does not have that responsibility, but apparently Mr. De Orchis doesn't want him to say that.

I will sustain the objection.

MR. MALOOF: Maybe Mr. DeOrchis will stipulate that the charterer does have the responsibility.

MR. DE ORCHIS: I will let the Judge decide that.

MR. MALOOF: I will withdraw that question, your Honor.

BY MR. MALOOF:

Q Captain, from the documents that I had asked you to study in this case, were you able to come to an opinion on the cause of entry of water into the John Weyerhaeuser?

A Yes, sir, I was.

Q And what opinion did you come to, sir?

A My opinion was that the water entered the John Weyerhaeuser through a corroded and broken clapper valve in the port side of No. 3 hatch, and possibly through a clapper valve that was located on the starboard side hatch as well.

Q When you say "broken," do you mean accidental broken or wear and tear broken?

A The evidence was that the clapper -- the disk, if you will, was corroded and frozen in an open position. By "frozen" I mean stuck in an open position to rust.

MR. WARNER: May I have that read, please?

(Record read by the reporter.)

Q By rust?

A Due to rust.

Q Due to rust?

A Yes.

Q Captain, could this have been a freshwater entry into the No. 3 lower hold bilge?

A No, sir.

Q Is that impossible, more or less?

A It is. The only way freshwater could enter the No. 3 bilge would be through the overflow of a wash basin through the drainage of the wash basin or a shower, if the wash basin and shower was connected up to that sanitary line.

Q Would any captain of a Liberty ship know that?

A Yes, sir.

MR. MALOOF: Mr. Warner, would you have a piping diagram for this vessel as of 1966?

(Conference off the record.)

MR. WARNER: This is all we have (handing).

MR. MALOOF: Thank you.

BY MR.MALOOF:

Q Was it evident, sir, from your study of the logs --

Let me rephrase that; I will withdraw that question.

From your study of the logbook did you note any difference between the No. 3 and the other holds in the

ship?

A Any difference as to what, sir?

Q As to the problem we are talking about, sir.

A Yes. The No. 3 hold -- I should say the No. 3 bilges which serve the common No. 2 and No. 3 holds, showed from both soundings and the pumping that there was water entering these hatches, this compartment where it was not entering the other compartments in the vessel.

Q And in your experience is that a significant fact?

A Yes, sir, it is.

Q On a ship like this are the bilges in the engine room and the bilges in the No. 3 lower hold connected in any way, or are they separate?

A The bilges are separate, completely separate, sir.

Q Did the logbooks indicate when would have been the end of the Madras voyage?

A The logbooks indicated the end of the Hopewell, Virginia,-Madras-Portland, Oregon, voyage.

Q And it ended where, sir?

A It ended in Portland on the 6th of -- I beg your pardon, it ended in Portland on the 15th of October at 2400 -- midnight.

Q Captain, are ships' drafts very important?

A Yes, sir.

Q And did you study them in this case?

A I did, sir.

Q Did I ask you whether you were able from the documents to give an estimate of the number of tons of seawater that entered this ship at various stages of the voyage between Tampa and Moji?

A You haven't asked me that yet, no.

Q Did you do that?

A Yes, sir.

Q And were you able to come up with your estimate of the tonnage of seawater which entered?

A I was, sir.

Q Would you give the Court your estimate on the voyage from Tampa to Cristobal?

A Yes, sir.

(After examining) On the voyage from Tampa to Cristobal, my records indicate -- my analysis indicates that the vessel had 169 tons of added weight to the vessel between the time she sailed from Tampa and the time she arrived at Cristobal in the Canal Zone.

The only way a vessel can add weight at sea is by the entry of seawater into the vessel under way.

Q And did you do the same thing for the period of time that the vessel was at Cristobal?

A I did, sir.

Q What is your estimate on that, sir?

A Between the time the vessel arrived at Cristobal, after bunkering and steaming off Cristobal to clean her decks of an oil spill -- between the time she returned and it was all-fast alongside the pier at the Industrial Division of the Canal Zone -- between that time, on the 30th of December and her sailing from Cristobal on the 13th of January, the vessel gained another inch and a half of draft which would amount to TPI 73 tons.

Q Was that last estimate, sir, the period of time she was at Cristobal?

A Yes, sir.

Q And did you estimate for the period of time for the voyage, for the passage from Cristobal to Balboa?

A I did.

Q Will you tell the Court that estimate?

A During that period of time the vessel gained one inch, during the passage, which is the difference in draft between sailing from Cristobal and sailing to Balboa -- the vessel gained one inch, and that amounts to 48.9 tons -- 49 tons TPI.

Q And the voyage from Balboa to Moji, the same answer -- will you give us your answer, please?

A Yes. During this period of time the vessel gained 1 foot 6-1/2 inches, which amounts to 899 tons.

Q So what total did you arrive at, sir, from Tampa to Moji?

A 1,190 tons.

Q Of extra weight?

A Of extra weight.

Q And you interpret that to mean seawater, sir?

A I do, sir, since the vessel did not discharge or load any cargo during this period of time and the bunkering, the fuel oil bunkers that the vessel took on at Cristobal is taken into account in these calculations, plus whatever fresh water was taken.

Q You took into account everything that you should have?

A I did, sir.

Q Now, sir, assuming that there is a hole in the bottom of the port clapper valve, and assume again the ship is light -- that is to say, the valve is above the sea --

A Yes.

Q -- would water still go down into the bilges?

A If the valve was corroded, the valve body was

corroded, if the plugs at the bottom of the valve was leaking, if the flanges were leaking or corroded, yes, sir.

Q From where, sir?

A From the sanitary line which that valve services.

Q The human waste would go through that particular hole?

A Well, no, sir --well, depending upon the size hole we are talking about.

If the valve wastesprogressively, if the steel wastes progressively it doesn't all of a sudden happen. It is a progressing that happens over a period of time. It begins with a pinhole or a series of pinholes or leaks in an area, which allows water to drip through -- in some cases come through in a small steady stream, but solid objects would continue to pass through and go over the side.

Q You mean liquid human waste, possibly some of it would go through the hole into the hold?

A Yes.

Q But not necessarily solid waste.

A No, sir. There might come a time when the hole got large enough in area, then of course solid waste and everything would go into the hold.

Q There is a reference in Baumgartner's deposition,

where Mr. Baumgartner said he was not sure the log was true.

From your experience, sir, what do you make of this remark?

MR. DE ORCHIS: Objection, your Honor.

THE COURT: Sustained.

Q Do you have an opinion on that remark?

MR. DE ORCHIS: Objection.

THE COURT: Sustained.

MR. MALOOF: I will withdraw the question, your Honor.

Q Then at another stage Mr. Baumgartner said that the log doesn't say they were pumping water from the bilges.

Were you able to reach any conclusion when you read that?

A Yes, sir.

Q What conclusion?

A Well, I think Mr. Baumgartner may have been kidding, or he may have been -- I am sure he did not mean what he said. That is the only thing you pump from the bilges is water.

Q Now if this were a ship of yours when you were working for the Grace Line, sir, and if you had read the logs on the Madras voyage, perhaps while the ship was still at Portland, what would you have done?

MR. DE ORCHIS: Objection, your Honor.

THE COURT: Sustained.

MR. MALOOF: I will withdraw the question.

Q Assume that you were the marine manager and the captain told you that "No. 3 lower hold is showing water and we had to keep pumping it out," what should Mr. Baumgartner have done, sir?

A Mr. Baumgartner should have immediately investigated the problems, determined from discussion with the master and the chief engineer and a review of the logbooks how often this occurrence took place. Had he done that he would have known that there was a problem, and then investigate the cause of the entry of this water to determine what the cause was and rectify it.

Q If he never learned the cause of the water, should he have sent the ship to sea with cargo aboard?

A No, sir.

Q Assuming that he was not told by the captain but simply read the logbooks for the Madras voyage, what should he have done?

A If he had simply read the logbooks he should have come to the same conclusion, that there was a definite, continuing problem in the bilge lines that served the No. 2-3

common cargo hold.

Q When you say "a problem," --

A That there was an entry of water.

Q And would your answer be the same,he should not have sent the ship to sea in that condition?

A Yes, until he determined what the cause was, where the water was coming from,and rectify it.

Q From your experience would you be able to answer whether or not this ship was seaworthy at Baltimore?

MR. DE ORCHIS: Objection, your Honor.

THE COURT: I will allow it.

A I would say this vessel was not seaworthy to carry cargo in No. 2 or No. 3 hatches.

Q Well, let us go beyond cargo. Would it be seaworthy with any human beings on it?

A In Baltimore?

Q In going to sea, sir, across the Pacific.

A Well --

Q I will withdraw that question.

A It is a difficult question to answer.

Q Now, sir, on the same questions I had addressed to you with regard to Mr. Baumgartner, assume that Mr. Balkunas read the logbook for the Madras voyage only. What should he have done?

A Captain Balkunas, having read the deck logbook and seen the bilge soundings, he should have then consulted with the marine superintendent, Mr. Baumgartner, to determine if Mr. Baumgartner's review of the engine room logs indicated a considerable amount of pumping in No. 3, and as the logbook shows that would have been seen.

He should then have, together with Mr. Baumgartner, determined what the situation was, what was causing the entry of water into this compartment, and Mr. Baumgartner then should have rectified it.

Q Assume the captain knew the ship was leaking at Baltimore. What should he have done?

A He should not have allowed --

Q Excuse me. Let me add something further to the question. And he didn't know the cause of the leak. Then what should he have done?

A Well, sir, he should have first of all not allowed any cargo to be loaded into the common No. 2 and No. 3 hold, and he should have immediately informed his

owners of the problem and requested that they find the cause of this water entry and correct it.

Q Assume further that Mr. Baumgartner, besides reading the Madras logs, also had an opportunity to read the logs for the voyage from the Northwest around to Baltimore.

A Yes, sir.

Q What should he have done in that case?

A This just adds icing to the cake, if you will. It is further evidence from the deck logs in particular that there is a continuing progressive entry of water into the No. 2 and No. 3 compartment.

Q And would your answer be the same for Captain Balkunas?

A Yes, sir.

Q And the master of the ship?

A Yes, sir.

Q Are you familiar with Liberty ships, sir?

A Yes, sir.

Q This problem with the clapper valve, does it come to an owner of a Liberty ship as a complete shock?

A No, sir.

Q Was it a sort of a continuing problem that people should always have been careful of?

A Yes, sir.

Q That is on Liberty ships and similar type ships?

A The clapper valve of the Liberty ships in particular gave a great deal of problems.

Q Do inspections of the cargo hold customarily go into the logbook?

A Yes, sir.

Q Are they recorded?

A Yes, sir.

Q Captain, Captain Dumble, in his deposition, said that at one point in Cristobal he was told by the carpenter that there was six feet of water in the No. 3 lower hold, but on that day the log only records 38 inches.

A Yes, sir.

Q Are you able to come to some conclusion from that fact?

A Well, sir, the only conclusion is that the bilge soundings don't reflect for that day particularly the height of the water in the No. 3 port and starboard bilges that occurred in that day.

Q Sir, what's the purpose of sounding the bilges in the cargo holds?

A The purpose of sounding the bilges in the cargo holds is to determine if there is any entry of water into the vessel.

Q What's the purpose of sounding the bilges, for example, in the No. 3 lower hold?

A The purpose of sounding the bilges in the No. 3 lower hold is to determine if there is any entry of water into the No. 2 and 3 common compartment, lower hold compartment.

Q The cargo compartment?

A The cargo compartment.

Q Do you have an opinion, sir, from the logbooks and the depositions that you have read, on whether, having sent the ship to sea this way, the damage to the Iligan cargo would have been certain or not?

A Yes, sir, I do.

Q What is your opinion?

A With the situation as it developed on the ship from the records of the previous voyages, and had nothing been done to rectify this situation, then my opinion is that damage to the Iligan cargo would certainly result.

MR. MALOOF: Your witness.

CROSS EXAMINATION

BY MR. WARNER:

Q Captain, have you ever served in a Liberty-type vessel?

A I have never sailed in one, no, sir.

Q What has your experience been? What type of vessels have you served on?

A Victorys, C-2s, C-3s and passenger vessels.

Q I want to call your attention to an October 13, 1966 entry. I think there was colloquy in your testimony with respect to "Pump No. 3 port cargo hold bilges (Bridge) 1405."

A Yes, sir.

Q Didn't you comment it was unusual for the bridge to call down and order the bilges to be pumped?

A I testified that it was unusual with the vessel at sea at 1405, which is 5 minutes past 2 in the afternoon, for the bridge to call to the engine room with the specific request that No. 3 port bilge be pumped.

Q I ask you then to look at Exhibit 31 in evidence, and I ask you to read the full entry at the bottom of the right-hand page there and interpret it for us.

A "Evaporater to domestic tanks, steam out

starboard settler 8:20 to 11:50. Pumped out No. 1 port and starboard cargo hold bilges. Pumping out ballast No. 3 port and starboard double bottom. Four hours."

Q What is No. 3 port and starboard double bottom?

A No. 3 port and starboard double bottom is the fuel oil tank. A fuel oil double bottom.

Q Was there ballasting?

A Yes.

Q That means sea water was being pumped out, right?

A Out of the double bottom.

Q Isn't it possible some of it got into the bilges while they were pumping out and that is why the bridge ordered them to pump out the bilges as well?

A No.

Q Wouldn't that be a common-sense order from the bridge, if you are pumping out the double bottom to also suggest the bilges be pumped out as well?

A No, sir.

Q You wouldn't do it if you were on a vessel?

A No, sir.

Q You wouldn't do it if you were on a vessel?

A No, sir.

Q Is there any sheer on a Liberty ship, if you know?

A Sheer?

Q Yes, sheer.

A Yes.

Q How much?

A I wouldn't know the exact amount.

Q But you testified it floats flat?

A Yes.

Q So if there was water on the end of No. 2 it wouldn't run aft?

A No, sir.

Q There was not sufficient sheer for it to run aft?

A There is sheer measured on the weather deck of the vessel. There is no sheer in the tank tops. The tank tops of the Liberty are parallel with the flat keel.

Q How many vessels have you served in that you have been down by the head at sea?

A I have never been down by the head at sea.

Q How many vessels have you observed that have been down by the head at sea?

A At sea?

Q Yes.

A I have observed no vessel down by the head at sea.

Q You testified on your direct that you examined logbooks and three depositions, of Mandle, Baumgartner and Captain Dumble. Did you read anything else relating to the trip to Iligan City?

A Would you repeat your question again, counselor?

Q You have testified on direct you examined the deck and engine logbooks, and you also read the depositions of the master, Mr. Baumbartner and Mr. Mandle. My question to you is, did you examine any other documents?

A Yes, sir, I did.

Q What other documents did you examine?

A I examined survey reports issued by the American Bureau of Shipping.

Q May I show them to you?

A Yes, sir.

Q Did you examine this file, E10 for identification (handing)?

A This survey by Captain J. B. Rynbergen I have never seen. These two stowage plans for a lumber cargo

I have never seen.

MR. WARNER: May I have this marked for identification, please.

(Defendant Weyerhaeuser Exhibit O marked for identification.)

A The American Bureau of Shipping report No. NO14994, New Orleans, July 14th, I may have seen. I saw a number of American Bureau of Shipping survey reports.

Q May I show you --

MR. MALOOF: What was the date of that?

THE WITNESS: July 14, 1963.

Q May I show you Weyerhaeuser Exhibit O for identification. Was this the sheaf of reports you saw, or copies thereof?

MR. MALOOF: I must object to this. I was very careful during my direct to limit the captain's opinions to his examination of the logbooks and the depositions. I think Mr. Warner is about to make the captain his witness if he introduces that document. I was careful on that, and I am sure that is what I did.

THE COURT: He hasn't offered it yet. I will allow the question.

A I haven't seen this specific file. I have seen photostatic copies.

Q Of that file?

A I am not sure it was this file. I haven't attempted to match every ABS report I saw with this one, but I have seen some 53-odd, if I am not mistaken, American Bureau of Shipping reports covering the SS John Weyerhaeuser.

Q Fifty-three?

A Yes, sir.

Q Did you find anything derogatory about the John Weyerhaeuser in any of the ABS reports?

MR. MALOOF: Objection. That is not responsive to direct.

THE COURT: It is a conclusion. I will allow the question.

Do you understand what he means by anything derogatory?

THE WITNESS: Yes, sir, I do.

THE COURT: All right.

A I would never expect to find anything derogatory in any ABS report about any vessel.

Q Why?

A Because it is not the function of the American Bureau of Shipping to make derogatory remarks about the vessels they class. The ABS report simply determines

that for the vessel to remain in class a certain piece of work must be done and has been done and the vessel is, therefore, retained in class, and the surveyor so recommends to the American Bureau of Shipping.

Q Is the word of art describing what should be done called an outstanding?

A No. An outstanding is work that has been allowed to be deferred, either to owner's convenience or to next special survey or to next annual survey, next drydocking, et cetera.

Q Is the word of art a recommendation?

A A recommendation is work to be done, yes, sir.

Q Did you find in any of these 57 reports that you examined that any recommendation made by the American Bureau of Shipping had not been carried out with respect to the John Weyerhaeuser?

A I did not, sir.

Q What is the general reputation of Weyerhaeuser? You have been in the trade for a great many years, in the steamship business.

MR. MALOOF: Objection.

THE COURT: I will sustain the objection.

Q Do you know Mr. Baumgartner personally?

A No, sir.

Q You never met him?

A I never met him.

Q Were the opinions and conclusions you expressed here this morning based in any way upon the American Bureau of Shipping documents that you examined?

A No, sir.

Q That had no relevance and no influence upon your judgment?

A No, sir.

Q In short, you relied upon the logbooks and the three depositions?

A Yes, sir.

Q Anything else?

A No, sir.

Q Nothing else?

A Nothing else.

Q Any surveyors' reports?

A Surveyors' reports, yes, as to the amount of water in the hatch in Moji, the condition of the valve, yes.

Q Anything else?

A No, sir.

Q What was your relationship with Liberty ships? You claim you had something to do with them. You testi-

fied you haven't sailed in them. What did you have to do with them?

A I operated for a period of four years four Liberty ships.

Q Four Liberty ships?

A Yes.

Q During what period?

A The period of 1959 to 1964.

Q For what company?

A Peninsula Navigation Corporation.

Q What was your role at that time?

A General operating manager.

Q What did your duties consist of?

A They consisted of the supervision of the entire marine operation, which included the hiring, the selection and hiring, of masters, of chief engineers, first officers, chief officers, the maintenance and repair of the vessel, their husbanding, their storing, their manning, bunkering, insurance, P and I placed on the vessels, the negotiation of charters for the employment of the vessel, the appointment of agents to handle the vessel in foreign ports, the arrangement for stevedoring cargo into and out of the vessel, when that was the function of the owner of the particular charter party.

Q Did you have anything to do with the bi-annual, or I think at that time it was the annual Coast Guard inspection of the vessel?

A Oh, yes.

Q What did that consist of? What did they do?

A Biennial investigation?

Q Let's take that. What did they do?

A At that time, if I am not mistaken, we weren't on biennial, but perhaps we were. I forget exactly. That entailed seeing to it that a port engineer was assigned to the vessel during the conduct of the biennial inspection, assuring that any recommendations made by the Coast Guard inspector inspecting the vessel were carried out promptly.

Q Did you personally participate with the Coast Guard in the inspection of any of these four Libertys?

A In some cases, yes.

Q What did you do?

A I went with the inspector while he conducted his inspection.

Q Did the Coast Guard inspect the holds of the Libertys while you were there?

A In some cases, yes.

Q Was that required in the biennial inspection?

A Yes.

Q What do they do when they go into the hold?

A They look for general cleanliness and condition, they invariably inspect the bilges, the rose boxes, they inspect the tank tops, the manhole covers for the double bottom tank tops for leakage, they inspect the bulkheads for signs of wastage, erosion. It varies with the inspector. Some go down and walk around the hatch and climb up again, and some make a very thorough and detailed inspection. It all depends on the inspector involved.

Q Were you aware that the John Weyerhaeuser had undergone a biennial inspection at Portland, Oregon prior to the voyage we were talking about?

A I was, sir.

Q Were you aware the American Bureau attended the vessel, also?

A I was, sir.

Q Did you take that into consideration in reaching your opinion this morning?

A Well, yes. When you say take it into consideration, I was aware of that fact when I reached my opinion, yes.

Q Were you aware that at the Port of Baltimore

three or four surveyors attended the vessel and surveyed her for an on-hire survey?

MR. MALOOF: Objection to that. That is a fact not in the record, sir.

THE COURT: There was some testimony about somebody going on the vessel at Baltimore. Now, I don't claim to remember just what it was, whether it was three or four surveyors or one or two.

Had anybody told you that anybody went on the vessel at Baltimore and looked at it before she sailed?

THE WITNESS: Yes, your Honor.

THE COURT: All right.

BY MR. WARNER:

Q Did you take that into consideration in reaching your opinion this morning?

A I did, sir.

Q Did you know surveyors also attended the vessel in Tampa before the loaded in No. 3?

A Yes,sir.

Q And you took that into consideration this morning before reaching your opinion?

A I did, sir.

THE COURT: I gather the water that came aboard on previous voyages is what you base your opinion on

primarily, isn't it?

THE WITNESS: That, your Honor, plus the water that continuously entered after the vessel left Baltimore and while she was in Baltimore.

THE COURT: But if we are trying to decide whether somebody should have done something about it at Baltimore, as I believe you said Mr. Baumgartner shouldn't ever have let that ship sail?

THE WITNESS: Yes, sir.

THE COURT: You are basing that primarily on the record of what happened on the previous voyages?

THE WITNESS: That's correct, your Honor.

THE COURT: All right.

BY MR. WARNER:

Q Did you compute the increased draft of the vessel between Baltimore and Tampa?

A No.

Q Why didn't you?

A Because in Baltimore the vessel is in brackish water. The exact salinity of the water in Baltimore I do not know, and it would be a very involved calculation to determine it.

Q It is done every day, isn't it, by any operating man?

A Not really.

Q How do you know whether your vessel is overloaded or not when you sail from Baltimore?

A If you are on your drafts, yes, you would do it. If you are loading a deadweight cargo in Baltimore you would predetermine what the salinity of the water was and determine to what marks you could load in Baltimore so that when the vessel arrived in salt water she would be on her marks.

Q You will agree with me any third mate could compute what the real draft is?

A Knowing the salinity, of course.

Q But you didn't do it?

A I didn't dtermine the salinity of the water in Baltimore at that particular time, no. I don't know how I would know what the salinity of the water in Baltimore was in December of 1966.

Q Did you make any effort to find out?

A No, I di d not.

Q On your direct you said that problems with clapper valves were quite common in Libertys. Are problems with clapper valves common with other vessels?

A Not to the extent that they were in the Liberty ship. They were a problem in the Liberty ship simply

because they were out of the way, they were in a cargo space, and they had a tendency to corrode, corrosion advanced before people really had a chance to determine they were corroding. Most clapper valves are in the engine room where they are under surveillance 24 hours a day.

Q You are talking now about a vessel in which the engine room is midships, are you not?

A That's right.

Q What do they do about the ones where the engine room is on the stern, run the pipes back there?

A That's right.

Q What's the difficulty -- you say they didn't have as much difficulty on other than Liberty ships. Did they have difficulty with clapper valves on other ships?

A I am sorry. I didn't hear you.

Q Did they have difficulty with clapper valves on vessels other than Libertys?

A The Liberty was famous for it.

Q What about other vessels? What about the Victory?

A I haven't heard of it being a problem on a Victory ship.

Q Did you ever have any problems in your four-ship fleet with clapper valves?

A No, sir, we did not.

Q And you operated them for four years?

A Yes, sir.

Q I think you testified on direct that you worked for Grace Line.

A Yes, sir.

Q You transitted the Panama Canal on numerous occasions, I gather?

A I transitted the Panama Canal on one occasion only.

Q You were talking about salinity of the water at Baltimore. What about the salinity of the water at Tampa?

A Tampa is right on the sea. The salinity of the water in the port of Tampa would be salt water, as far as I am concerned. There would be no fresh water allowance.

Q You are playing here with about -- you computed 169 tons, right?

A Yes.

Q So we are talking about three inches?

A Three and a half inches.

Q All right, three and a half.

So we have a little swell coming in, and if somebody took the drafts incorrectly and if you have got that coupled with a little fresh water, that could toss your figures out completely, could it not?

MR. MALOOF: Is that in the record, that someone took the drafts incorrectly?

THE COURT: No. He is asking if they didn't get the figures right.

MR. MALOOF: All right, that was a hypothetical.

THE COURT: And I suppose it would.

A If they didn't have the figures correct.

Q It is not unusual, is it, Captain, to have to guess at the draft. When you get out there it is going up and down as you look at the front end of the ship and you sort of take a mean of what it is, do you not?

A No, sir, you don't.

Q What do you do when you have a swell?

A I know of no place you have a swell running when you are made fast alongside a pier.

Q What about little wavelets?

A No, sir.

Q Not a bit?

A I have never seen little wavelets around the vessel --

Q You never stood there and watched --

MR. MALOOF: Let the witness give the answer

THE COURT: Let him finish.

A I have never seen little wavelets around the bow or the stern of a ship alongside a pier other than in ports like Capetown, for an example, where there is a definite surge. But in Tampa, Florida, or in New York or in Cristobal, I have never seen little wavelets. The water is usually still.

Q Whenever you have gone out there the water has been lying there like a bathtub and there has been no rise and fall in the water there as you looked at it?

A Not alongside the ship. The ship is alongside the pier. You are looking at the inboard side of the vessel. The draft marks are aft of the stern and on the sternpost.

Q In short, you have never stood out there and watched the water go up and down and done just like that and decided that was the mean?

MR. MALOOF: I think we are approaching argumentation, your Honor.

THE COURT: I think so.

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MR. WARNER: All right. I will withdraw the question.

BY MR. WARNER:

Q Now, you gave us some figures on the change in the draft while the vessel was in the Panama Canal area. I think you came up with one and a half inches for a total 73 tons.

A Yes, sir. While she was at Cristobal.

Q Didyou take into consideration the vessel took fresh water there?

A Yes, sir.

Q How many tons did she take?

A While she was in -- I didn't take into consideration the fresh water she took there. I took into consideration the fresh water she had and the fuel oil that she had when the draft was taken after bunkering and steaming to clean decks and arriving at the industrial works in the Canal Zone. I took that draft as noted in the logbook. I then -- and I noted the fuel oil that was on board at the time and the fresh water that was noted as being on board at the time. I then made an allowance for the fuel oil that she burned.

Q How much was that?

A A total of 600 barrels or 89 tons, and the

logbook shows that on sailing from Cristobal she had five tons less fresh water aboard than she had on arrival.

So taking that total of 94 tons which the vessel consumed, if you will--and I made no allowance in this, by the way, for other stores consumed so these are on the high side, I made no allowance for the fact that the vessel's provisions were being consumed by the crew, I made no allowance for the fact that lube oil was being consumed in the engine room, because these are difficult things to determine, so I made no allowance for that consumption. This is just the consumption of the fuel oil and the amount offresh water she had noted in the log on sailing as opposed to the amount of fresh water that she had loaded noted in the log when the drafts were noted at the industrial canal.

Q Tell me, Captain, was a change in draft of an inch or an inch and a half sufficient to alert a master to the fact there was something wrong with his vessel?

A Certainly.

Q Tell me why?

A Because when you are drawing an inch and a half more than you think you should upon leaving the Canal, and you have been drawing three and a half inches more than you should upon arriving at the Canal, and

masters --

Q I am talking about the inch and a half in the Canal.

A The master should have known about the three and a half inches arriving at the Canal, and certainly he should have been concerned about the additional inch and a half the vessel apparently took on while in the Canal.

Q First of all, my question was -- you come back and you have answered three and a half. My question was directed to the inch and a half.

A I am sorry.

Q And I asked you if the inch and a half was sufficient to alert the master?

A Yes, sir.

Q In other words, it is your position that this taking of the draft is an exact science?

A The taking of a draft is as exact as you can possibly make it, and it is exact, as exact as anything is in the shipping business.

Q Tell us how you take the draft. Describe the front end of the ship with the markings.

A The draft marks are six inches high. They are six inches between the top of one draft mark and the

bottom of another.

The draft is taken -- you have a six-inch area to --

Q To guess?

A -- to look at. You can tell whether you are half, which is three inches, or a quarter, which is an inch and a half, and so on.

Q But we don't have inch marks?

A No.

Q All we have got is a 2, 3 or something of that sort, which is six inches high?

A Yes.

Q And then a void space, and then there will be 2, 4 after that?

A Yes.

Q So you have to look and say I guess it's so-and-so and I will decide it's such-and-such?

A No, sir.

Q It's an eye measurement depending on the individual. One individual, the second mate, might take it one way and the third mate might gauge it differently?

A This is always a possibility. However, reading drafts after you have read enough it becomes a very

good, almost a science, if anything in the shipping business can be called a science.

Q Were there any waves in Cristobal that you are aware of?

A Pardon?

Q Waves in Cristobal when you have been in there?

A Not alongside of the pier, no.

Q Not alongside of the pier?

A No, sir. Not when I have been in Cristobal.

Q Captain, you talked about a hole, an opening, in the No. 3 port sanitary valve line in the lower hold of the John Weyerhaeuser. In your opinion, what was the cause of that hole, do you know?

A Well, my opinion, based on the surveyors' reports and based upon the testimony of Mr. Mandle and Mr. Baumgartner, is that it was was wasted, corroded, corroded through. I didn't see it.

Q So you really don't have your own opinion?

A No.

Q You have no personal knowledge of the facts upon which you based your opinion? You haven't seen the valve?

A I have not seen the valve.

MR. MALOOF: Objection. He had the oppor-

tunity to read the testimony of the operating manager and marine superintendent of defendant Weyerhaeuser.

THE COURT: He made clear what he based it upon.

BY MR. WARNER:

Q Do I understand your testimony to be that it is your opinion that the No. 3 port clapper valve had been leaking for a substantial period of time prior to the vessel commencing loading at Baltimore for Iligan?

A Yes, sir.

Q What facts do you base that opinion on?

A The fact that -- two facts. One is the continuing entry of water into the No. 2 and No. 3 compartment as evidenced by prior voyages, the logbooks of prior voyages, and, secondly, the testimony of Mr. Mandle and Mr. Baumbartner, the master, coupled with the survey reports at Moji, all of which indicated or stated that this valve was wasted with a hole, and I think at one point it was described as being a quarter of an inch by four inches wasted area. This is something that takes a long time to heppen.

Q How long?

A I couldn't possibly give you a specific time, but certainly it would be measured in months.

Q How many months?

A Well, again it is impossible for me to give you a specific time, but I would say a minimum of six months -- and that is an estimate.

Q I gather that as a deck officer and a master you have been responsible for the condition of the cargo compartments before cargo was loaded, have you not?

A Yes.

Q What did you do in the normal course of events before receiving the cargo?

A Before receiving the cargo the chief officer and the first assistant engineer inspect all of the hatches that the cargo is to be loaded into.

They look for oil leaks, faulty manhole covers in the double bottoms. They inspect the bilges; determine that the rose boxes are clear, the strainers are clear, that they are properly covered.

They inspect the hatches for cleanliness, and that is about the extent of the inspection that the chief officer and the first engineer make.

Q Is there any indication that any less than that

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was done by the WEYERHAEUSER personnel on the JOHN WEYERHAEUSER on the trip in question?

MR. MALOOF: Objection, your Honor. I do not think it is possible to answer that.

THE COURT: All he can say is whether there was any such indication in the material that he read.

MR. MALOOF: Then I will withdraw that.

A I saw no entry in the vessel's deck log that such an inspection was made prior to loading cargo at Baltimore.

Q Is there any indication that the steps which you have suggested were not taken by WEYERHAEUSER?

A Well, all I can answer, sir, is that I see no indication in the vessel's deck logbook that such an inspection was made.

Q You in your role as a charterer and as an owner and agent are familiar with the on-hire surveys, are you not?

A I am.

Q What do these surveyors do when they have an on-hire survey?

A The purpose of an on-hire survey is to determine any pre-existing stevedore damage. And by "stevedore damage" let me explain -- any damage to the vessel's structure that is caused by stevedores loading cargo into or discharging

khb 3 deBouthillier - cross

cargo out of the ship, and to determine any hull indents caused by the vessel landing heavily against piers or caused by tugboats landing heavily against the vessel.

This is the essence of an on-hire survey and --

Q Would they -- excuse me.

A -- and also indicate the condition and amount of sweat battens in the vessel and to note any deficiencies in the pipe guards or items of that nature.

Q Would they pay attention to any signs of leakage?

A Yes, if there were signs, definite signs of leakage, they certainly should -- whether they would or not, but a proper survey should.

Q And were you aware that the bilge pump of the JOHN WEYERHAEUSER had been sent ashore for repairs in Portland, Oregon? Did you notice that?

A No.

Q You didn't pay any attention to that? Did you notice the entries relating to the cleaning of the strainer and getting this out of the bilge system running into No. 3?

A During the voyages that I looked at the log?

Q Yes.

A Yes, sir.

Q What inferences did you draw from that?

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A Well, in one case there was an entry that trash was being removed from the bilge suction.

I could only assume trash would be anything -- it might have been this fertilizer that was mixed with water and that was clogging up.

That is the only trash I can think of.

Q If you got trash in the valve system of the bilge, could that permit a backing up of water into No. 3?

A Trash in the system?

Q In the system so that the valves couldn't properly close.

A No, it wouldn't back up. It would just be unable to pump.

Q But no water could go into the bilge if the bilge-line and valves are open?

A From the engine room?

Q From the engine room, yes.

A If the suction valve is filled with trash, no, I would say no.

Q Are you familiar with the manifold system on the bulkhead between the engine room and No. 3 whereby the valves for the control of the pumping system on a Liberty in the forward end of a ship are located -- are you familiar with those valves?

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A I am familiar with them but I am not qualified really to go into a technical detail.

Q Have you ever been down in the engine room and supervised the pumping of bilges?

A No.

Q Have you ever had anything to do with a bilge pump?

A With a bilge pump?

Q Yes.

A No, sir.

Q You are a deckman?

A That is correct.

Q So you really do not know from what the water could have backed up through the system, do you?

A Your question I thought was if the bilge suction in No. 3 port was clogged with trash, would that cause the water to back up in that system, and to that extent I said, No."

MR. MALOOF: Judge, I am going to object to this whole line of questioning. I do not understand it. His witnesses from San Francisco know very well how water came into the ship. Why do we spend time on this back-up of bilge pumps?

THE COURT: I will permit it. I assume this is preliminary to something that the defendant wants to bring

out later. If he does not, of course I will ignore it completely.

We will take a five-minute recess.

(Five-minute recess.)

MR. WARNER: This is the last one on cross.

Weyerhaeuser offers in evidence Exhibit U, which consists of the American Bureau of Shipping reports relating to the JOHN WEYERHAEUSER (handing).

MR. MALOOF: I object to this, your Honor. I think your Honor has ruled on it. We do not know what person made the surveys. I cannot possibly cross-examine it. It isn't good evidence, your Honor.

THE COURT: May I see it, please.

(Document handed to the Court.)

MR. MALOOF: I might add that the law is that if this is a due diligence case, it does not mean due diligence in gathering certificates.

MR. DeORCHIS: May I be heard just a second on this, your Honor?

THE COURT: Yes.

MR. DeORCHIS: The witness has testified that he studied, among other things, these reports, the ABS reports.

MR. MALOOF: No, I limited my questions to the logbooks and the depositions -- although he may have looked

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at them, and we do not even know which ones.

THE COURT: According to my notes Mr. deBouthillier said he did not base his opinion on the ABS reports, is that right?

THE WITNESS: That is right.

THE COURT: There is no testimony about these that I am aware of. They were just marked for identification this morning.

I will sustain the objection at this point.

MR. WARNER: No further questions, your Honor.

THE COURT: Any cross, Mr. DeOrchis?

MR. DeORCHIS: Yes, your Honor.

CROSS-EXAMINATION

BY MR. DeORCHIS:

Q Did you read the ABS reports in making a study in this case? Did you look at them?

A I looked at some of them, yes.

Q Did you just disregard them or did you take the into consideration?

A Well, when you say "disregard them," I am afraid I don't quite understand what you mean. I did not disregard them.

Q In arriving at your opinion in this case didn't you consider, among other things, the ABS reports?

A I considered the ABS reports determining or reporting on the cause of the entry of water into the No. at Moji, yes, sir.

MR. MALOOF: Judge, I will withdraw the objection to the ABS reports which simply refer to the entry of water through the port clapper valve, if that is what Mr. DeOrchis wants. As a matter of fact, they said port and starboard clapper valves. I would not mind having that in the record, sir. There are about two or three that refer to them, but not the ones that go back about six or seven or eight years.

MR. DE ORCHIS: It is only the entries relating to this valve that we are interested in in this case. I have no objection to just the entries relating to the valve.

MR. MALOOF: That would mean the ABS reports at Moji and Moapa, sir.

MR. DE ORCHIS: Whatever --

MR. MALOOF: I will withdraw my objection to those ABS reports.

Q There is one thing I do not understand about your testimony --

MR. MALOOF: Could we finish that first? We ought to take that up first.

THE COURT: Yes. Exhibit O for identification is a great batch of reports. I don't know what the reports consist of.

Do they include certain reports made of inspections of this valve at Moji?

MR. WARNER: Your Honor, two or three months ago we furnished a Xerox copy of each and every one of these reports to counsel for the plaintiff, so this comes as no surprise to him.

MR. MALOOF: They are immaterial.

MR. WARNER: He had them all. We gave him the whole bit. It was our intention to offer the whole thing, showing the condition of this vessel.

We have another collection after this event, so now we are getting a technical objection after everything has been shoveled into this case.

I don't know which ones -- I cannot pick them out offhand.

THE COURT: Perhaps Mr. deBouthillier can tell us which ones those reports in Exhibit O he did look at and consider.

I will give him a chance to do that.

THE WITNESS: Thank you, your Honor.

(Proposed exhibit handed to the witness.)

THE WITNESS: (After examining) I have -- am I to tell what I read?

THE COURT: Yes.

THE WITNESS: I have read the ABS report, No. BS 1550, dated Pusan, Korea, March 17, 1967.

I read the ABS report, No. XU 3883, dated Kure, Japan, February 26, 1967.

I have read the American Bureau of Shipping report, No. BL 3892, dated Balboa, Canal Zone, January 10, 1967.

I have read American Bureau of Shipping report No. SH 7984, dated Savannah, Georgia, November 30, 1966.

I have read the American Bureau of Shipping report, No. SH 7985, dated Savannah, Georgia, November 30, 1966.

I have read American Bureau of Shipping report, No. SH -- I am sorry, this is a copy of it.

I have read American Bureau of Shipping report, No. LA 6815, dated Los Angeles, November 4, 1966.

I have read American Bureau of Shipping report

No. PO 1008, dated Portland, Oregon, October 21, 1966.

I have read American Bureau of Shipping report No. PO 1009, dated Portland, Oregon, October 21, 1966.

I have read report of annual loadline inspection, American Bureau of Shipping report No. PO 1009X, dated October 21, 1966.

I have read American Bureau of Shipping report, unnumbered, Singapore, 17th September, 1966.

I have read American Bureau of Shipping report No. PA 9318, dated Philadelphia, Pennsylvania, June 18, 1966.

I have read American Bureau of Shipping report No. PA 9319, dated Philadelphia, Pennsylvania, June 18, 1966.

I have read the report of annual load-line inspection, American Bureau of Shipping report No. SF 14..24, dated October 15, 1965.

I am back around 1964 -- do want me to keep going through?

MR. MALOOF: Judge, I will repeat my objection to all except the ABS reports which discuss this valve. The hearsay rule still applies to anything before that, and I press my objection strenuously to that. I would rather examine an ABS inspector who made the inspection.

MR. DE ORCHIS: I think I can avoid cluttering the record with all these reports, your Honor. I think I was questioning the witness when he started to look at the records.

BY MR. DE ORCHIS:

Q I will ask you this question: in all of the reports of the American Bureau of Shipping which you studied, did you find any entry that indicated that the clapper valve or the overflow discharge valve in No. 3 either needed to be replaced or repaired?

A Oh, yes.

Q You found that?

A Yes.

Q Where did you find that?

A At Moji.

Q Before Moji --

A No, sir.

Q -- did you find any?

MR. MALOOF: I object to that as another way of getting the hearsay in.

THE COURT: Sustained.

Is the authenticity of these reports conceded, that these are ABS reports?

MR. MALOOF: I do not know what to concede, your Honor. I just disagree that they should go into evidence because I will have no opportunity to protect my client's interest on the truth that is contained therein. I would not mind if they went in just to show that the Captain looked at them.

THE COURT: You can tell me whether you have a question as to their authenticity.

MR. MALOOF: No, I think they are probably authentic.

THE COURT: Do you have any further questions?

MR. DeORCHIS: I would like to ask the witness further.

BY MR. DeORCHIS:

Q Is there any doubt in your mind that these reports are authentic?

A No, sir.

Q Now, tell us just briefly what is the American Bureau of Shipping?

A The American Bureau of Shipping is a society which classifies vessels which are subscribed to the American Bureau of Shipping for classification.

Its function is to determine, first of all, the rules under which vessels are to be built, the --

I am making this brief.

Q Yes, brief.

A -- and to set forth the standards of plate thickness, various standards to be -- the minimum to which vessels may be classed with the Bureau.

Q Does it include the maintenance of the vessel?

A No, sir.

Q If a vessel has a broken line will the ship be allowed to sail by the Bureau?

A It depends on what line you are talking about.

Q If she has a broken sanitation line which serves the toilets of the crew?

A And the American Bureau of Shipping is made aware of this fact?

Q Yes.

A If the American Bureau of Shipping is made aware of this fact, no, they would require that the vessel be--

MR. MALOOF: I do not think that question is fair unless Mr. DeOrchis reminds the witness that the American Bureau of Shipping did not check the valves in April 1966.

THE COURT: Let him answer.

MR. MALOOF: I will withdraw that.

THE COURT: Does the American Bureau of Shipping inspect vessels before they sail?

THE WITNESS: No, sir.

THE COURT: Does it decide whether or not a vessel is going to be allowed to sail?

THE WITNESS: No, sir.

Q What is the purpose?

A The American Bureau of Shipping purely sees to it that the vessels are maintained in a class -- are maintained according to the rules of the American Bureau of Shipping.

THE COURT: What do you mean by "class"?

THE WITNESS: Well, sir, this is a term of art and I should not use it. It is a term that is used in the trade.

The American Bureau of Shipping holds annual surveys of vessels once a year.

These surveys are a hull survey, a boiler and machinery survey, and what is referred to as a load-line endorsement.

Every four years the American Bureau of Shipping holds on every vessel classed with the Bureau a special survey which is a very involved, in-depth survey, and in the ordinary course of the steamship business it takes about a year to perform -- the so-called year of grace in which this particular survey can be performed, and it is usually performed in a progressive fashion -- parts of it at the end of one voyage and the remaining parts at the next, so

that at the end of a given year the complete survey has been done.

The American Bureau of Shipping performs another function. When there is damage to a vessel and the damage is to be repaired, the owner advises the American Bureau of Shipping of the damage and asks the American Bureau of Shipping to supervise the repair in the sense that the American Bureau of Shipping can then certify that the repair was conducted and made to meet the minimum requirements of the Bureau, to allow the vessel to remain in the classification, in class with the Bureau.

Q Let me ask you, why do owners want to have their ships in class?

A Because if the vessels are not in class their insurance is vitiated.

Q You cannot insure a ship unless it is approved by the American Bureau of Shipping, isn't that correct?

A No, that is not correct.

Q Well, what did you just say? Why does an owner want to keep the ship in class?

A In the class but not necessarily in the --

Q There are other classification societies?

A Oh, quite a few.

Q Norwegian and German?

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A Yes.

Q But they all serve the same purpose?

A They all serve the same purpose.

Q Your ships, the Grace Line ships, were they classed by the American Bureau of Shipping?

A Grace Line ships were classed by the American Bureau of Shipping.

Q As to this ship and as to the voyage in question, when was the last time that this ship was in drydock and being inspected by the American Bureau of Shipping?

MR. MALOOF: Judge, I object to that. He is putting in the body, what we are talking about. I have an objection.

MR. DeORCHIS: This is cross-examination.

MR. MALOOF: No, this is voir dire on the ABS reports.

MR. DeORCHIS: Oh, no, Mr. Warner is through. I am cross-examining.

MR. MALOOF: Then we have an open objection.

THE COURT: Yes?

MR.MALOOF: Judge, I will add something to my objection. Mr. Baumgartner said that he did not trust every ABS surveyor. And there is testimony that this is not the only classification society. They are not a monopoly, so they come under the hearsay rule, judge.

THE COURT: In the first place, I do not understand what is meant by "class." Maybe it doesn't make any difference but I would like to know.

What is it?

THE WITNESS: "Class" is a statement meaning that the vessel, the particular vessel is carried on the register of the American Bureau of Shipping as having highest classification. It is a sort of circular definition, I am afraid, your Honor -- let me see if I can phrase it another way.

THE COURT: Do you have Class A vessels and Class B vessels and that sort of thing?

THE WITNESS: They have some limited classes -- they are classified limited to coastwise voyages, limited to lakes, harbors and rivers -- that sort of thing, yes but for ocean-going vessels, there is really only one classification, and that is the highest classification.

Over the years it involves -- it devolved into this jargon of saying that a vessel is in class or not in class. The term simply means that it remains in classification as long as it meets the minimum requirements of the American Bureau of Shipping as determined by the surveyors appointed by the American Bureau of Shipping to inspect the vessels annually in a reasonably cursory sort of way, and then every four to five-year interval a very

in-depth special survey.

THE COURT: Now, you say that you have read a certain number of these reports, the numbers of which you gave?

THE WITNESS: Yes.

THE COURT: Did you give any effect to those in the opinions that you expressed here?

THE WITNESS: The only effect, your Honor, was the report from Mogi, Japan and Mogpo, Korea, I believe, which sets forth the condition of the port and starboard clapper valves as seen by the American Bureau of Shipping surveyor who was called in by the vessel to survey the damage, to survey the condition of water in the No. 2 and No. 3 hold.

THE COURT: You did not pay any attention to any of the others?

THE WITNESS: No, sir.

THE COURT: Did he read the listed ones for Mogi?

MR. MALOOF: Yes, he did -- no, I am sorry, I don't have it down here.

(After examining.)

MR. MALOOF: Is that in Pusan, Korea? I do not see Mogi.

THE WITNESS: Well, that would be Korea.

MR. MALOOF: Is it in there? Is Kure, Japan the

same as Mogi, gentlemen?

There was a Mogi report. I think we have it.

I think we have been referring to the Kure, Japan survey as probably the Mogi survey.

- - -

THE WITNESS: May I see it?

MR. MALOOF: It is probably the same one as in your file,Captain (handing).

But I think also I have referred to it as Moji, but I do not think I have one as such.

Kure is the one for Moji.

THE WITNESS: Yes, it is the Moji survey. It is dated at Kure, Japan, which is the head office, I suppose, of the American Bureau of Shipping.

THE COURT: Is that KU 3883?

THE WITNESS: Yes, your Honor.

THE COURT: Dated February 27, 1967?

THE WITNESS: Yes, your Honor.

THE COURT: That is the one you read and studied and took into account?

THE WITNESS: Yes, sir.

THE COURT: And that is the one that there is no objection to, is that correct?

MR. MALOOF: I waive my objection to that one, sir.

THE COURT: I will receive that one in evidence and we will get that much accomplished.

Is this another copy --

MR. MALOOF: Well, this is my copy. We can put

that in.

THE COURT: A duplicate of the one that is in Exhibit O for identification?

MR. MALOOF: It would be. Why don't we use my copy so that we don't have to tear the file apart?

THE COURT: Very well.

MR. MALOOF: Identify it first and then we will mark it.

THE COURT: Are you offering it as a plaintiffs' exhibit?

MR. MALOOF: That is a defendants' exhibit, your Honor. I waive my objection to it.

THE COURT: What is what I understood.

All right, that is Defendants' Exhibit P.

(Defendant Weyerhaeuser Exhibit P received in evidence.)

MR. MALOOF: I also waive my objection to the Pusan, Korea, report, your Honor, which the witness testified that he also --

MR. WARNER: May it please the Court, Weyerhaeuser is offering all of them -- not the ones that are going to be picked and chosen by counsel for plaintiff.

THE COURT: I understand that, Mr. Warner, but I am going to have to rule on your offer.

Now to the extent that there is no objection, we will avoid any further problem, so just bear with me until we get that done.

Now what is the next one to which you do not object?

MR. MALOOF: Pusan, Korea, No. PS 1550 for identification, on behalf of defendant Weyerhaeuser.

THE COURT: All right.

xx (Defendant Weyerhaeuser Exhibit Q marked for identification.)

MR. MALOOF: And I waive the plaintiff's objection to that document, your Honor.

THE COURT: All right, that is received as Weyerhaeuser Exhibit Q.

xx (Defendant Weyerhaeuser Exhibit Q received in evidence.)

THE COURT: Now you might want to look, Mr. Maloof, at all the others that he mentioned.

MR. MALOOF: I have looked at them, your Honor, and Mr. Warner did mail them to me, but that does not, of course, make an exception to the hearsay rule.

THE COURT: May I see the others, please? I have not looked at them yet.

(Witness hands to the Court.)

THE COURT: This is going to take me a little while, I suppose. I would rather do this during the lunch hour. If there is something else we can do in the meantime, go ahead.

Do you have any further questions?

MR. DE ORCHIS: Yes, I do, your Honor.

THE COURT: All right, go ahead with your questions.

CROSS EXAMINATION CONTINUED

BY MR. DE ORCHIS:

Q Do you remember being asked by Mr. Maloof about the captain's testimony in which the captain said that when the ship was at Cristobal the carpenter had reported to the captain that there was 6 feet of water in the hold, and you pointed out that in the logbook it did not show -- it only showed a few inches?

Do you recall that?

A I recall stating that the logbook did not show 6 feet of water.

Q And you indicated in your direct examination that there was at least one instance where the logbook might be incorrect?

A I believe I said that was one instance where the bilge soundings as reflected in the logbook did not indicate

the amount of water that was in the bilge during that day.

Q But you know and I know that there were not 6 feet of water in the hold that day, isnt that so?

MR. MALOOF: Objection.

Q Isn't that so? You know that?

MR.MALOOF: Objection.

THE COURT: I will allow the question.

Q Isn't that so, that you know that there weren't 6 feet of water in the hold that day?

A No, sir, I do not.

Q Based on your studies?

A No, sir, I do not.

Q How much would the draft of that ship have changed that day if there had been 6 feet of water in that hold?

A I haven't worked it out.

Q You worked out everything else. Why didn't you work that out?

A Because I saw no reason to work it out.

Q Were there 6 feet of water in the hold that day?

A This is what the soundings determined.

Q Did you look at the drafts?

A No, sir.

Q Was there any change in draft?

A I didn't notice -- let me --let me.

Q You have told us that --

MR. MALOOF: May the witness finish?

MR. DE ORCHIS: All right, let the witness finish.

MR. MALOOF: He should be able to finish the answer.

THE COURT: Let him finish -- and please keep your voice down. There is no need to get all hot and bothered about this.

Is there a sounding somewhere that says there were 6 feet of water in the hold?

THE WITNESS: There is a statement by the master that the carpenter told him there was 6 feet of water. There is no sounding.

THE COURT: No sounding. All right.

A You asked me about the drafts.

Q I was asking you whether you meant to convey to us that in your opinion there were 6 feet of water in that hold, that the carpenter was right and the deck log was falsified?

A I never said the deck log was falsified.

Q Do you agree with me that the deck log was right and not this carpenter who said 6 feet of water in the hold?

A No, sir, I don't.

Q Based on the drafts of that ship?

A I did not take the drafts -- in the first place, the vessel was bunkering during this period of time -- she was taking on some --

(After examining) 7,696 barrels of fuel oil during this period. This was weight going into the ship.

She was also at some time during this period receiving 70 tons of freshwater. Whether it was at the exact time that the vessel was bunkering or not, the logbook is not clear.

The master, however, has testified that they were also taking on freshwater. The drafts of that ship were changing all over the place during that period.

Q How much does she change -- you have told us -- how much did she change while she was in Cristobal, from the first day to the last day?

A The vessel arrived after bunkering -- first of all, let me say that the logbook entry --

Q Just answer my question, please. I am asking a simple question.

MR. MALOOF: Judge, I wish Mr. DeOrchis would let the witness answer. He is trying to.

MR. DE ORCHIS: When I ask a direct question I expect a direct answer.

THE COURT: Let him finish his answer and if you

think it is not responsive you can move to strike it out.

MR. DE ORCHIS: Read the question.

May I have the question read back to the witness?

(Record read.)

THE COURT: Let us start the "simple" question over again.

BY MR. DE ORCHIS:

Q During the time she was in Cristobal how much did her draft change?

A To answer that -- and I want to answer completely and fully, when --

Q How much did the draft change?

MR. MALOOF: I object to Mr. DeOrchis's repetition of questions and harassment of the witness.

THE COURT: Go ahead.

(Question read by the reporter.)

A The logbook entries indicating the draft of the vessel on arrival at Cristobal are unclear.

The original entries in the deck log has been crossed out, ruled out, and I am not indicating anything by that other than that it was properly ruled out and another draft was written above it.

On the deck log, the photostatic copy that I saw it would be impossible to tell with any exactness what the

arrival draft was. So the vessel on arrival went to anchor.

She then shifted to her bunkering berth where she took on bunkers that I mentioned earlier, and apparently freswater to the tune of 70 tons.

She had had an oil spill on deck some time during the bunkering, so the vessel immediately after bunkering had to leave the bunkering pier where she steamed for some 12 hours off and on Cristal while they were washing down the decks and cleaning the oil spill off the decks.

The vessel then returned to Cristobal and made fast to the Industrial Works. This was on the 30th, I believe.

At that time drafts were taken when she was alongside the pier.

So to arrive -- to calculate the arrival draft at Cristobal, I took the clear, unchanged draft entered by the ship's officers when the vessel was alongside the pier at the Industrial Works.

I allowed then for the time she was steaming off and on Cristobal, the amount of fuel and the freshwater shown by the logbook in that period, and I made another allowance for the amount of bunkers which she had taken on on arrival at Cristobal, and worked back to what her draft actually was on arrival at Cristobal.

I am sorry to have to go into this.

Q And how much did her draft change between the time she was alongside at Cristobal and the time that she sailed?

A 1-1/2 inches -- well, I beg your pardon, I beg your pardon --what was the amount of her draft change?

(After examining) On arrival at Cristobal her draft was 26 feet,3 inches.

On departure Cristobal her draft was 28 feet, 4 inches.

Q And how much of the change in draft did you attribute to taking on of water?

A I took water and fuel oil and --

Q No, I am talking about the entry of water into the hold.

A Oh, I beg your pardon.

That was 1-1/2 inches -- 73 tons.

Q 70 what?

A 73 tons.

Q 73 tons?

A Yes.

Q And if we had 6 feet of water in No. 2 and No. 3 holds, how many tons would that be?

A I don't know -- 6 feet of water in No. 2 and No. 3 hold? I don't know.

Q Well, how did you tell us when she arrived in Moji -- you said 14 or 15 feet of water --

MR. MALOOF: I object to that. I don't think the witness said that at all.

A I did not.

Q How many tons of water did you allow for the trip from -- for the entry of water for the trip from Panama Canal to Moji?

A 899 tons.

Q And what was -- how many inches would that change her draft?

A 1 foot, 6-1/2 inches.

Q That is 1 foot, 6-1/2 inches represents 899 tons of water?

A That is correct, sir.

Q How many feet of water did the surveyors report -- everybody reported -- how many feet of water in the holds?

A It varied between 13 and 15 feet.

Q And if it was 6 feet, would it be about half, a little less than half?

A Yes.

Q And would that be a change in draft of about 6 or 7 inches in the Panama Canal?

A I expect so.

Q If she took 6 feet of water?

A I would expect so.

Q That is all I am asking.

Now, you said at Madras the trouble started at Madras on August 31st, was it?

A No, sir.

(After examining) I said it became very apparent at Madras on August 3rd.

Q All right, what happened that day that it became very apparent?

A There were 7 inches of water in No. 3 port in the A.M.; 0 inches in the starboard; and 13 inches of water in No. 3 port in the P.M.; 0 inches in the starboard.

Q That is during the monsoon season, is it not?

MR. MALOOF: I object to that. I haven't put on a hydrologist.

A There is always a monsoon season in India.

MR. MALOOF: If the witness knows.

Q Did you read the weather in the logbook?

A I did, sir.

Q Did you read the weather for the day before that day?

A Yes, I am sure I did.

Q Did you read why they had to stop working that day?

A I don't think they were working that day at all. They were at anchor, if I am not mistaken.

Q This is what -- August the 3rd or 31st?

MR. MALOOF: August 3rd.

A No, we are talking about August 3rd to August 5th.

Q That is 13 to 15 inches of water in the port side of the ship. You say that is a serious problem?

A I say that is a definite indication that there is a problem.

Q You heard Mr. Berke's testimony yesterday as a hull surveyor that 15 inches of water in a Liberty ship of this kind in one of the bilges he would not -- he did not consider that too great?

MR. MALOOF: Objection.

THE COURT: Sustained.

Q If we have 15 inches of water in one of the bilges on one side of the ship and no water in the bilge well on the other side of the ship, is that about equal to 7 or 8 inches in each one?

A No.

Q You would have more or less?

A Well, I don't understand. 15 inches of water in the port bilge is 15 inches of water in the port bilge to me.

Q How many gallons of water is that?

A 15 inches -- I don't have it in gallons.

A bilge well, when it is full -- 18 inches -- holds about half a ton of water -- 864 pounds, I believe.

Q Is that about 65 gallons?

A Well, I would have to work it out.

Q How much water was there on the other side, on the starboard side on that day, August 3rd?

A According to the logbook. no water at all -- zero.

Q My question to you was, if we have 15 inches on one side and zero on the other side, is that about the same as having 7-1/2 inches on each side -- the quantity of water in the hold?

A In the first place, the water isn't in the hold. In this case it is in the bilge well.

Q In the bilge well; right.

A Well, certainly 15 inches in one bilge well, from the standpoint of the number of gallons is the same as having 6-1/2 or 7-1/2, rather, inches in both bilge wells, from the standpoint of gallons or pounds of water that we are talking about.

Q And could the reason be that we have 15 inches on one side and zero on the other, simply be because the ship is listing to the port?

A No.

Q Was she listing to port that day?

A I really couldn't tell you, but it would make no difference at all.

Q Did you read the logbook?

A Yes, I did.

Q Did you read the listing in the logbook?

A I undoubtedly did, but I haven't made a note of it.

Q Are the lists shown -- the listing of the ship from port to starboard shown in the logbook?

A Yes, sir.

Q Now, on your trip from Madras to the West Coast --

A Yes, sir.

Q -- your second page of your chart --

A Yes, sir.

Q -- how much water do we have in that port bilge during the crossing?

A In the port bilge?

Q Port bilge, No. 3.

A We show no inches on the 7th.

On the 8th --

MR. MALOOF: Judge, I do not think that the witness said -- has given the answer what the listing was.

MR. DE ORCHIS: I am coming back to it.

MR. MALOOF: He was asked a question, then Mr. DeOrchis went off to something else. I think I know why, but I would like it on the record.

THE COURT: Are you going to have him read off this chart that is in evidence?

MR. DE ORCHIS: Yes. During that voyage.

BY MR. DE ORCHIS:

Q Was it always zero in the port bilge?

A No, sir.

Q What is it?

A On September 4th is zero inches. On the 5th, no soundings were noted for that day.

On the 6th, whatever soundings were in the port bilbe, they were under seven inches, and I made no notation of anything under seven inches generally.

On the 7th, we had 16 inches in the starboard side, zero inches in the port, a.m.; and p.m., 16 inches in the starboard side, zero inches in the port.

On the 8th, 9th, 10th, 11th, 12th, 13th and 14th, there were no soundings taken; no soundings noted, I should say. Whether they were taken or not, I don't know, but no soundings were noted in the logbook.

Q Did you relate the amount of inches when it is on one side of the ship and the other to whether the ship was listing one way or the other?

A The amount of water in the bilge well?

Q Yes.

A No, sir, not water in the bilge well.

Q Does this deck or floor of the hold -- does it rise in the middle and slant to both sides as you go from side to side of the ship?

A No, sir.

Q It is flat all the way across?

A Perfectly flat.

Q On September 1st, for example, September 4th, September 3rd, when it is zero in the port bilges and yet we have water in the starboard bilges -- do you follow me there on that chart?

A I do, sir.

Q -- what is your explanation for that?

A I really have no explanation. Water could have been leaking from -- I don't know, I really don't know.

Q Would you look at the logbook, Plaintiff's Exhibit 35,for those dates. September 2nd, for example. Those dates when we have water on the starboard side and none on the port side, was she listing?

A She had a 1-degree starboard list.

Q So the indication of water in one bilge or the other bilge doesn't necessarily mean there is a leak on one side of the ship or the other, does it?

A It doesn't necessarily mean it, no.

Q Whne the ship went from Portland down to the Panama Canal, back up to the East Coast, making a voyage like that, was the ship likely to suffer a lot of sweat?

A The vessel is likely to suffer some sweat, yes.

Q Isn't this a problem that navigators and ships' captains are faced with every time they go from a cold port like Portland to tropics like Panama and back to a cold port?

A Ventilation is always a problem.

Q Isn't it of prime importance if carrying cargo on that route to battle with this problem of ship sweat?

A You try to combat it and overcome it, yes.

Q Would it be surprising on a ship going from Portland to the Panama Canal as she approached the hot zones she would start sweating inside the ship?

A It is quite possible.

Q That is because the hot air would hit the cold metal of the hold. Would that cause an increase in the bilges?

A Not appreciable.

Q You think it is bad practice for an engineer

to automatically pump bilges every day for a couple of hours, regardless of whether there is water in the bilges or not, on a Liberty ship of this age?

A I have never heard of it being done.

Q That wasn't the question.

MR. MALOOF: I object to Mr. De Orchis' comment. That was his question.

THE COURT: No. The question is was it good or bad practice.

MR. MALOOF: And I thought he got a proper answer.

BY MR. DE ORCHIS:

Q Have you served with ship's engineers who made it a practice to pump bilges every day?

A No, sir.

Q You never have?

A No, sir.

Q Didyou ever ship regularly as a master?

A I have had three coastwise voyages.

Q As a substitute or a master?

A As a relief master.

Q A substitute?

A A relief master.

Q That is what it means?

A The term is "relief."

MR. MALOOF: I object to the argument.

THE COURT: Let's go on.

BY MR. DE ORCHIS:

Q Which department of a ship, the deck or the engineering department, takes soundings?

A The deck department.

Q Usually it is the carpenter?

A On ships that carry a carpenter, it is the carpenter. On ships that do not, it would be the deck maintenance man, possibly the boatswain.

Q When the carpenter makes his soundings, to whom does he report it?

A To the chief officer, and fills in a bilge sounding record which the chief officer keeps.

Q So this record that we see in the logbook, the bridge logbook, is the information furnished to the bridge by the ship's carpenter?

A That's correct.

Q Is that correct?

A That's correct.

THE COURT: I think it is time to adjourn for lunch. Two o'clock.

(Luncheon recess.)

mdal

AFTERNOON SESSION

(2:00 p.m.)

A L A I N d e B O U T H I L L I E R resumed.

THE COURT: I have looked over Defendant Weyerhaeuser's Exhibit O for identification, which is a thick file of documents which appear to be American Bureau of Shipping reports, and I understand that the authenticity of these documents as being actually American Bureau of Shipping reports is not in dispute. But the objection has been made that they are incompetent, and as far as I know there is no formal proof of the sort that one would normally expect that these are records made in the regular course of business and that is is the regular course of business of the inspector to make such a record, and although I don't really have any doubt about it, in view of the objection I feel obliged to sustain the objection to the great mass of these documents in Exhibit O.

The defendant is, of course, at liberty to supply that formal proof. We would still have a question, it would seem to me, of relevancy as to many of them because they go way back to 1961, and earlier, and it is hard for me to see what possible relevance that might have, but that is not our present problem. So I sustain

the objection for lack of formal foundation to Exhibit O as a whole.

Now, Mr. deBouthillier did say that in the course of his preparation for his testimony he examined certain of these reports. He was very precise in giving us the numbers and dates of the ones he examined. I think that the defendants are entitled to have those particular reports in evidence, not as proof of the truth of the contents of the reports but as constituting documents that the witness says he examined, so that they may cross examine upon it if they so desire.

So I will receive for that limited purpose at this time such of these documents as the witness said he examined.

Now, this will take a little time, but I've got the list of the numbers here and we will give each one of them a separate defendant's exhibit number and receive them on that basis.

Do you happen to have the numbers that you read off? If you don't, I have.

We will have to take these apart, and suppose you make a list of the numbers. The first two are already in as Exhibits P and Q. They are taken care of.

The next one is No. BL3892, Balboa, January 10.

1967.

SH7984, Savannah, November 30, 1966.

SH7985, Savannah, November 30, 1966.

LA6815, Los Angeles, November 4, 1966.

PO1008, Portland, October 21, 1966.

PO1009, Portland, October 21, 1966.

PO1009X, October 21, 1966.

The next one is undated, Singapore, September 17, 1966 -- unnumbered.

The next one is PA9318, Philadelphia, June 18, 1966.

PA9319, Philadelphia, June 18, 1966.

SP14124, October 15, 1965.

I hope I have those right. I would suggest that you go through the labor of putting labels on those during the recess so we won't have to spend a half hour holding it up.

There they are. If anybody wants to cross examine on them now is the time.

I think Mr. De Orchis has the floor at the moment.

CROSS EXAMINATION CONTINUED

BY MR. DE ORCHIS:

Q Can you tell us, during the time that you

worked for various shipping companies in your career, did any of those companies use the American Bureau of Shipping?

A Yes, sir.

Q Can you name some of them that did?

A We used the American Bureau of Shipping. All of the companies I worked for used the American Bureau of Shipping.

Q In your experience in these companies that used the American Bureau of Shipping, was it the regular course of business of the American Bureau of Shipping to report to the shipowners with reports such as these that you have seen this morning?

A That's correct.

Q Would you look at the chart again, please, for the time she was in Baltimore -- and here is the log-book for the time she was in Baltimore. When she was loading cargo at Baltimore was the first date December -- my copy is pretty bad. Can you tell me what the first date is? Is it December 12th, from your chart?

A My chart doesn't indicate when cargo began to be loaded.

Q What is the first date she is at Baltimore?

A She arrived in Baltimore on the 11th of Decem-

ber.

Q On the 12th, you have made a record of the bilge soundings, have you not, on your chart?

A Yes, sir, that's correct.

Q And on the 12th, what were the bilge soundings in No. 3?

A 0,0, 0, 0, a.m. and p.m., both sides.

Q On the 13th, what were the bilge soundings?

A 0, 0, 0, 0, a.m. and p.m., both sides.

Q And, finally, on the next date, October 14th?

A A.M., 12 inches port, zero inches starboard; p.m., 12 inches port, zero inches starboard.

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Q Now we have 12 inches of water in the port bilge that wasn't there the day before?

A That is correct, sir.

Q Can you tell us if the clapper valve on this date -- would the clapper valve have been above the waterline or below the waterline?

A Above the waterline.

Q So can we agree that this water could not have come in through the clapper valve from outside?

A I would think not.

Q Now we are agreeing that the clapper valve has something to do with these 12 inches of water?

A No, sir.

Q You mean "Yes, sir"?

A No, sir.

Q You don't agree?

A No.

Q I thought you just said the water could not have come through that clapper valve from the outside?

A I did say that.

Q Now you are saying that it is a possibility it came from some other source?

A From the clapper valve.

Q From what?

A From the water on the inside of the clapper valve, from the sanitary line.

Q The only other source that you have to offer, then, is the water coming through the sanitary line and getting into the hold through a hole in the sanitary line?

A Not necessarily a hole; through a slack flange, rusted, wasted flange, and pinholes -- porosity in the body of the valve, a leaking plug in the bottom of the valve.

Q Where do you get any of these things that you have just mentioned? You never saw the valve at any time, am I correct?

A That is correct.

Q Where are you getting that, that there were pinholes in the valve?

A The statementof the American Bureau of Shipping surveyor in Moji.

Q Who said what?

A Who said that the valve was leaking throughout, was leaking at the plug; it was leaking at the flange, it was leaking from the top inspection plate. It was leaking from the valve generally.

Q Did he find a hole in the valve?

A In Moji?

Q Yes.

A Yes.

Q Now what was the size of the hole?

A I believe it was 1-1/4 inches by 1/4 inch.

I would have to refresh my memory from the American Bureau of Shipping report.

Q Assuming that these 12 inches of water in the bilge came from the sanitation line, do you know the dimensions of that bilge other than that it is 18 inches deep?

A Yes, sir.

Q What are the dimensions?

A 18 inches wide, or 18 inches long, I should say, from the after bulkhead extending forward; 18 inches deep and 7 feet long.

Q And how many cubic feet would that be?

A I have it here in my notes, if I may refer to it.

Q Surely.

(Witness examines.)

A I am sorry to hold you up, counsellor, I really am, but I have these figures here somewhere. There is a lot of documentation here.

Q Isn't it a simple arithmetic, 1-1/2 times 1-1/2 times 7?

A Yes, it is.

Q That gives you 15. something?

A Yes.

Q Let us say 15 cubic feet?

A It is about 15 cubic feet. It comes to 844 pounds -- or 944 pounds of freshwater, and a little over 1000 pounds of saltwater.

Q And 944 pounds of freshwater is how many gallons?

A I would have to go and get my book and get the conversion factor.

Q Is it about 8 or 9 pounds?

A Pardon?

Q Is it 8 to 9 pounds, somewhere in there?

MR. MALOOF: I don't understand that question, your Honor.

Q Per gallon of water?

MR. MALOOF: It is 944 pounds.

A I would have to check it -- if I may be allowed to get my book, I will tell you how many gallons.

THE COURT: Do you have it right here?

THE WITNESS: Yes, sir, I have it in court.

THE COURT: All right.

THE WITNESS: Thank you.

(The witness leaves the stand and returns shortly thereafter.)

A (After examining) One gallon of freshwater is

8.33 pounds.

Q So if this was freshwater about how many gallons of liquid would you have in that accumulation of 18 inches in this bilge well?

A Well, was that freshwater?

Q Yes.

A With 18 inches in the bilge well?

Q Right.

A You would have 800 -- 940-odd pounds.

Q No; how many gallons?

(Witness examines.)

Q Just roughly. It does not have to be exact.

MR. MALOOF: Judge, it would have been good if Mr. DeOrchis came with the scale, to save a little time. Making a mathematician out of the witness doesn't help the Court any.

A (After examining) About 116 gallons.

Q And in your opinion all of this water came from the sanitation line?

A The only way I could see it entering the vessel, yes.

Q Now, when you studied the logbooks did you look at the weather for the day before this accumulation occurred?

A Yes, I did.

Q And what happened at Baltimore that day?

A It snowed very heavily and then rained.

Q The day before that did it snow?

A I don't believe so. I will check it.

(After examining) There is no indication of any show or rain on that day.

Q So the first day that we have this accumulation of 18 inches in the hold is the day after this heavy snow, isn't it?

A (After examining) Yes, sir.

Q And in fact didn't they have to quit working because the snow was so heavy?

A (After examining) The logbook states that:

"1125 A.M. hatches covered, stevedores K.O. due to heavey snowing."

Q And during the rest of the time that she remained in Baltimore she always had a few inches of water in that hold -- 15, 16 or 18 inches -- I mean inthe bilge well -- looking at your chart -- that would be easier.

A (After examining) Yes, sir.

Q And when she sailed from Baltimore the water went down?

A According to the bilge soundings, that is correct,

sir.

Q In making your computations based on the drafts of the ship that you told us about this morning, did you consider the salinity of the water in different ports?

A No, I did not.

Q Does a ship have the same draft -- a given ship with a given load on her, does she have the same draft in freshwater as she would in saltwater?

A No, sir.

Q Is there a considerable difference?

A From total fresh to total salt there would be a difference of 7 inches.

Q And a ship coming out of a place like Tampa, would she rise up out of the water as she sailed from Tampa?

A No, sir.

Q Is the water in Tampa, the salinity of the water in Tampa the same as the ocean?

A Yes.

Q That is your information?

A That is my opinion.

Q How about Cristobal?

A The same thing in Cristobal.

Q Is there a lot of surge in Cristobal?

A I have never seen any, alongside the pier.

Q You have been there?

A Yes, sir.

Q Is it an open area with just a breakwater?

A Are you talking about the piers?

Q The piers.

A No, the piers are well protected.

Q Tell me, how is the draft reading taken from the ship or of the ship?

A The draft reading, as I tried to explain before, the draft marks are along the stem of the ship a little aft of the stem of the ship and on the sternpost of the ship, the rudder post of the ship.

Q The two ends of the ship?

A The two ends.

Q And is that the most accurate place on the ship, those two ends? Are those the most accurate place to measure the draft or the least accurate?

A As accurate as any other place.

Q I mean, having fluctuations as the ship floats in the water?

A They will change with the trim of the ship.

Q Every surge or every wave going by, does the water go up and down the draft mark?

A If a wave goes by, yes.

Q Well, a 1-inch wave going by will change the draft by one inch, will it not?

A A 1-inch wave -- and I must admit I have never seen a 1-inch wave, but if there was such a thing as a 1-inch wave at the moment it goes by that draft mark, naturally it will change that draft mark by one inch.

Q And the man taking the draft, he does not use any tape measure, does he?

A No.

Q He just stands on the dock and looks down in the water where the ship is, and from the distance, wherever he is on the dock down to the waterline he tries to read what the draft is, is that so?

A No, sir, he doesn't try to read; he reads what the draft is.

Q Is every inch mark marked on there?

A No, sir.

Q So he estimates.

A No, sir, he doesn't estimate. His eye tells him. This becomes very accurate with practice. His eye tells him what the draft is.

Q You have never had experience of two officers going out to take a draft and coming back with two different answers?

A Not in my experience.

Q Never?

A Never in my experience.

Q If the ship has a little bit of a list, even a little bit of a list and you are reading the draft on one side of the ship -- let us say the side that is higher up -- isn't the draft on the other side of the ship lower down?

A Yes, sir.

Q So the list would make the reading false?

A A pronounced list would.

Q And it is this kind of information that you did all these computations on to the inch?

A I beg your pardon?

Q I am saying, you accepted as correct these readings of drafts in the logbook, and then by computation you came out with one more inch would equal so many gallons of water. This is the exact science you have described this morning?

A One more inch would equal so many tons of water, yes.

Q Well, we are in agreement that these readings of the draft are not done with any instrument; just with the naked eye?

A Right.

Q And that a slight list of the ship might change it?

A No, sir, I dont agree that a slight list might change it.

MR. MALOOF: He doesn't agree because he did not say that.

Q The salinity of the water certainly changes it?

A Yes, sir.

Q And you did not take into account the information available in the books published by the Government about the salinity of water in each port, did you?

A I did not use any documents regarding the salinity of water, or books, in either Tampa, Cristobal, Balboa or Moji.

These areas are seaports and are right contiguous to the ocean.

Q One other question. On December 13, the day of the snow --

A Yes, sir.

Q -- did they have trouble with No. 3 hatch?

Would you look in the logbook?

(Witness examines.)

MR. MALOOF: May we get an explanation of what kind of trouble Mr. DeOrchis is talking about?

MR. DE ORCHIS: The carpenters were unable to

close the hatch because of the snow.

A (After examining) Yes, at 5.00 p.m. it says here "Carpenters K.O., unable" it looks like "close No. 3."

Q That is the day of the heavy snow?

A Yes, sir.

Q Now the next day we have the reading for the first time?

A That is correct.

MR. DE ORCHIS: Thank you.

MR. MALOOF: Are you done?

THE COURT: Are you finished?

MR. DE ORCHIS: I am finished, your Honor.

MR. MALOOF: I have a couple of short questions, your Honor.

REDIRECT EXAMINATION

BY MR. MALOOF:

Q Captain, in your study of this logbook on the voyage, the Iligan voyage, did you see any places where she was down by the head?

A No, sir.

Q Are the drafts of a ship required to be kept by law?

A They are, sir.

Q Is it a crime if they are not kept accurately?

A I believe it is.

Q You did not take the drafts for every day, did you?

A No, sir.

Q Have you ever heard of a ship having to pump a cargo hold bilge every watch?

A No, sir.

Q Will you assume, please, that on a voyage, on the voyage of the John Weyerhaeuser from about May 27th, 1967, to June 21st or thereabouts, 1967, from Long Beach to Okinawa on that voyage, the pumping entries -- there are only two pumping entries in the engine log for that period of time -- assume that, please; can you then give us your opinion on what the practice of the company was on pumping every day?

A Well, that would indicate that they did not pump every day.

MR. MALOOF: Would you please read that question back.

(Question read.)

MR. DE ORCHIS: I will object to that now that it has been read back. There is one thing in that question, and that is the "practice of the company." My question was the practice of the engineer who was on the ship at the

time.

MR. MALOOF: Well, I was asking him a question.

THE COURT: It seems obvious that if on a long voyage they only pump twice, they did not pump every day, and I do not see that you have to go into details on that.

BY MR. MALOOF:

Q Have you ever heard of a sprinkler system on a Liberty ship, sir?

A Whereabouts on a Liberty ship?

Q In the cargo holds.

A No, sir.

Q In your estimate of the tonnage of seawater which entered this vessel going across the Pacific, how close did you come to the master's own estimate of 1200 tons?

A Very close. My estimate from Madras was 1190 tons.

Q Do you remember what the master's estimate was on the deposition?

A 1200 tons.

MR. MALOOF: Thank you, Captain deBouthillier.

THE COURT: Is that all?

MR. WARNER: No questions, your Honor.

MR. DE ORCHIS: No questions.

(Witness excused.)

MR. MALOOF: May it please the Court, I think it has been stipulated that the following three documents may go into evidence.

Am I right (indicating)?

MR. WARNER: We agree to the authenticity of the documents.

MR. MALOOF: Mr. Kennedy will make a statement to the Court.

We had subpoenaed London Salvage, your Honor.

MR. KENNEDY: Your Honor, we subpoenaed London Salvage for the purpose of identifying some of their records.

MR. Warner asked me if we really needed the testimony.

I said, "If you agree to the documents going into evidence without proper identification, we would not call London Salvage."

It is my understanding that there was such an agreement, and we released London Salvage from the subpoena, on the strength of Mr. Warner's representation; and it is also my understanding that Mr. DeOrchis was spoken to about this offer and he also agreed that the documents would be permitted in evidence.

THE COURT: Well, why don't you offer them and we will see what happens to them.

MR. MALOOF: The plaintiff asks to have these marked for identification.

(Plaintiffs' Exhibits 76, 77 and 78 marked for identification.)

MR. MALOOF: Plaintiff offers these documents, Plaintiffs' Exhibits 76, 77 and78 in evidence, pursuant to the stipulation of the parties -- the consideration of which has already been paid.

MR. DE ORCHIS: I have to object to the fact, your Honor, the same that MR. Maloof made to the American Bureau of Shipping -- that is, that it is hearsay. These are -- in fact, when your Honor looks at them, they are double hearsay. Someone from Japan writing about what he heard from somebody else, so even if the man was on the stand I would have the same objection. These are hearsay.

MR. MALOOF: We took the trouble to subpoena people. They havan't done that.

MR. DE ORCHIS: Not from Japan.

MR.MALOOF: Well, we did.

(Proposed exhibits handed to Court.)

THE COURT: Do you object to these, Mr. Warner?

MR. WARNER: My objection is not to the authenticity, but if the gentleman from the salvage association was here he would identify them as coming from his files.

But I do object to the hearsay and the double hearsay. The documents are authentic, yes, but not as to the truth of the contents, it is obvious.

THE COURT: Exhibit 76 is a carbon copy of a letter from somebody. I don't even know who is supposed to have written this letter.

MR. MALOOF: May I see it, your Honor? I don't recall.

THE COURT: Who is it from (handing)?

MR. MALOOF: If it please the Court, there would have been a witness on the stand to identify who sent it and who received it, but we let them go when they agreed to let them in evidence -- it is as simple as that.

THE COURT: Well, who is it from?

MR. MALOOF: (After examining) Can you tell?

MR. WARNER: This appears to me to be a letter from the New York office of the Salvage Association to their head office in London.

THE COURT: What is the Salvage Association?

MR. WARNER: The Salvage Association, your Honor, is a -- if you have a marine policy and if you are going to present a claim to your underwriters, there is a United States Salvage Association and a London Salvage Association. If you are going to present a claim to your underwriters

you call them in and they observe the repairs, the money expended, and they approve the bills and all that, and that in turn goes to the underwriters and it is paid.

That is the role of the Salvage Association. They advise counsel about it.

THE COURT: May I see it, please?

(Document handed to Court.)

THE COURT: For what purpose is all this offered?

MR. KENNEDY: Your Honor, two of the exhibits are offered to show that the sanitary lines in question -- that is, the one coming from the port side of the No. 3 hold and the one coming from the starboard side of the No. 3 hold -- are attached to the master's quarters in one case and to the radio operator's quarters in the other case.

There was some discussion yesterday, some testimony yesterday, concerning how many toilets were attached to the sanitary lines, and these documents clearly indicate that there was one toilet and possibly a shower attached to each line.

If the defendants will stipulate that there was only one toilet and perhaps a shower or basin attached to each line we wouldn't offer the documents.

THE COURT: I cannot receive the documents in evidence as the truth of their contents, so I must sustain the objection.

If all you are trying to figure out is -- if all you are trying to prove is how many toilets dis-

charged into that line that we have heard so much about I would hope you could agree on that. Is there any secret about it? Doesn't anybody know how many toilets there were?

MR. DE ORCHIS: The captain testified on page 85 of his deposition that there were 22 toilets, and that is where I am getting my information.

MR. MALOOF: If it please the Court, the captain also thought this water was coming from fresh water some place. I don't think he knew much about the ship.

I think the shipowner ought to be able to tell the Court what went into those clapper valves.

THE COURT: I sustain the objection.

MR. MALOOF: Then I call upon London Salvage to go onto the stand, please.

Will you tell him to go, Mr. Warner?

MR. WARNER: After our discussion at 5 o'clock that night I called the gentleman and told him he didn't have to be here today.

MR. MALOOF: May I bring him in as part of my rebuttal, your Honor?

THE COURT: Yes, you may call him as part of your rebuttal, as far as that goes.

MR. MALOOF: Thank you, sir.

If it please the Court, I am about finished with my direct case, subject to that understanding, sir.

What is the exhibit of the Iligan voyage?

MR. KENNEDY: EA.

MR. MALOOF: That is the Iligan voyage file with many, many papers in it. I have not objected to the introduction of that entire file. But I think it is very bad housekeeping to have an exhibit with so many loose papers, your Honor.

Is there some way those papers can be stamped, at least, or marked in some way? There must be a hundred papers in there.

THE COURT: They can be stapled in the file.

MR. MALOOF: I would like them marked so we know those papers stay there and no others put in.

THE COURT: The clerk can put a staple through it, I suppose.

MR. MALOOF: With that plaintiff rests its case subject to rebuttal, if necessary.

MR. WARNER: Your Honor, you asked us to cull from the Baumbartner deposition the exhibits.

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THE COURT: I am sorry, I don't follow you.

MR. WARNER: Your Honor, I will make my offer with respect to that a little later. Some of them had been marked and some had not.

Mr. Malcof, are you still objecting to these?

MR. MALOOF: This whole thing?

MR. WARNER: Yes.

MR. MALOOF: I object to the introduction of all these repair orders on the same basis as the objection to the Madras folder.

Objection to Weyerhaeuser D7 for identification.

Objection to Weyerhaeuser D4 for identification.

Objection to Weyerhaeuser D5 for identification and D6 for identification. They are similar to other documents that have been offered.

And objection to D2 and D3 for identification.

THE COURT: What do your records show? Are these exhibits to the deposition of Harold Baumgartner?

MR. WARNER: Yes, your Honor.

THE COURT: Are there seven such exhibits?

THE CLERK: D1 to D7.

MR. MALOOF: D1 I refer to, too.

THE COURT: Are you offering these now?

MR. WARNER: D1 I skip. I retract that.

D2 I offer. It gives the dimensions of the valve involved in this lawsuit.

MR. MALOOF: There is no proof that that is the same valve, your Honor. As a matter of fact, I think the proof was otherwise.

MR. WARNER: D3 I offer.

THE COURT: I thought we had disposed of this at the time we had the Baumgartner deposition. Apparently we didn't. I am going to have to look at that and see what was said about it. Where is the Baumgartner deposition?

MR. MALOOF: I think, Mr. Warner, you had the original of the Baumgartner deposition.

THE CLERK: That is Weyerhaeuser Exhibit C.

MR. WARNER: Here it is, your Honor.

(Document handed to Court.)

THE COURT: You are going to have to help me on this. I don't want to spend the rest of the afternoon on this. You hand me a lot of papers which mean absolutely nothing, but that they were exhibits at a deposition. You are going to have to show me where they were marked, what was said about them. The objection is made that this is the wrong valve. I don't know whether it is the wrong valve or not. Did anybody

identify this at a deposition?

MR. WARNER: Yes, your Honor.

THE COURT: Where?

MR. WARNER: It appears at page 17 of the Baumgartner deposition, Exhibit 2 for identification.

THE COURT: Will you tell me what it is you think identifies Exhibit 2? According to the record on page 17 Mr. Fish said: "I ask that this be marked," and it was marked. Did anybody say what it was?

MR. DE ORCHIS: 15, your Honor.

MR. WARNER: Page 15 is where the colloquy starts, your Honor.

THE COURT: I don't see why we have to waste so much time on things that I should think any reasonable adult lawyers could agree on.

Do you seriously maintain that this is the wrong valve?

MR. MALOOF: Yes, I do, your Honor. On page 16. It is in the record on page 16.

THE COURT: Then we will go into it no matter how long it takes.

MR. MALOOF: Mr. Baumgartner says, "I will accept that as a drawing of a clapper valve." That is the basis that it was marked for identification.

THE COURT: All right. No matter howhard it is, I will stay with you.

MR. MALOOF: Judge, I don't mean to delay the trial any, but you can mark anything for identification on a deposition, even your hat, and the other side can't object to that. This is the time for objections to it.

THE COURT: I appreciate that. If they are trying to sneak in the wrong valve on you, you ought to protect your rights. It does seem to me unlikely, but we are going to have to find where the testimony is.

MR. MALOOF: Page 16, line 8, they are talking about this picture. Then it goes for a couple of pages.

MR. WARNER: The question put to him:

"I ask you, Captain, whether or not this diagram is an accurate diagram of the type of clapper valve involved."

"To answer your question that is a reasonable drawing. I would accept that as a drawing of the clapper valve."

THE COURT: That is the testimony?

MR. WARNER: Yes.

THE COURT: I will have to sustain the objec-

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tion. He didn't say that's a drawing of the valve with which we are concerned.

Probably it is, and probably you can find somebody that can prove it, but that is not what he said.

Now, are all the rest of these going to be the same sort of thing?

MR. MALOOF: Yes, sir.

MR. WARNER: I now offer D5 for identification.

THE COURT: How about 3 and 4?

MR. WARNER: I have skipped those. We are cutting it down.

MR. MALOOF: I think it's already been identified, your Honor.

THE COURT: Now we are up to 5. Where is that talked about in the testimony?

MR. WARNER: It is on page 20, your Honor. It is Exhibit 4 in the deposition. The colloquy starts on page 19:

"Can you tell us what that report is, Mr. Baumgartner?

"A This is a report on the completion of the second special periodical survey No. 1 of hull and machinery in the annual boiler survey.

"Mr. Fish: I will ask to have that marked as a further exhibit for identification.

"Q That is the survey report that you received, Mr. Baumgartner?

"A From the ABS at the conclusion of their survey."

It is marked Exhibit 4 for identification. Further on he testifies that he attended that survey, he was present, on page 20, lines 12 and 13.

THE COURT: Is there objection to this?

MR. MALOOF: I object to its entry into evidence. Again, you just don't prove a survey this way. They should have brought the surveyor here and put him on the stand akd asked him what he did, how he did it and what he saw.

While Mr. Baumgartner says he was there, I refer your Honor to the top of page 21, line 2:

"Were you present when those discharge valves were examined?

"A Either I was present at the time the surveyor examined them or I did see the valve prior to its closing up. I may not have been there at the moment he was there."

I object to it as gross hearsay.

THE COURT: This is another ABS report, and if there were any evidence it is the regular course of business of ABS to make surveys and reports and this is such a report and it was made in the regular course of business I would accept it as a regular business record.

As I said before, I don't certainly doubt that that is the case, but nobody has proved it yet.

Now, all the depsotion says is this is a report that I received and I was there. If we are going to try this like a criminal case we are going to have to try it that way and stick to the very technical rules of evidence.

It doesn't seem to me that in a nonjury admiralty case lawyers ought to act as though they were defending people charged with a crime, but it is my job to enforce the rules of evidence. I sustain the objection without a further foundation.

MR. WARNER: Your Honor, I now offer D7 for identification, which is the Baumgartner Exhibit 1 which is referred to at page 14 of this deposition.

THE COURT: All right. Now, page 13 the witness said:

"This file consists primarily of work requests made to my office by the ship master," and so forth.

Then it was marked for identification, and the witness said:

"I maintained this file in my own office."

Is that all there is about it?

MR. WARNER: There was a description by Mr. Fish that describes what was in it, and opposing counsel was told it was available at any time for his inspection.

THE COURT: You are offering the whole thing?

MR. WARNER: Yes, to show when a request came from the ship for a repair to anything it was done promptly and without any question about it.

THE COURT: What's the objection to this one?

MR. MALOOF: If it please the Court, my objection to this one is on the grounds of competence and relevance. This is the full repair file. If there was one word in it about the clapper valve I wouldn't object to it. I notice the top item is the ice cube machine was fixed. What that has to do with this case I have no idea. The whole thing reads that way. We have a lot of papers in now.

THE COURT: Is there anything in it about the condition with which we are concerned here?

MR. WARNER: No, your Honor, but it does show

that any complaint, any request, any requisition from the ship was carried out forthwith. There have been accusations around here we were running a -- we weren't doing what we were supposed to do in maintaining the ship. So we produced the raw records to show that we did. There was no haggling about prices. There was an order to the repair shop to come in and remedy whatever the situation was. It was a stereotype printed form.

THE COURT: I am going to sustain the objection to these papers as really just cluttering the record with irrelevancies. The first batch is headed "Balto," and then there are about six or seven documents saying, "Please furnish services of workmen." I don't know whether the services were furnished or not. To struggle through all of this would be interminable, and since everybody agrees it has nothing to do with the valve that we are concerned with it seems to me unnecessary labor.

If you want to prove what you just said, that whenever anybody wanted some work done you can call a witness and he can so testify, but I don't think I should be asked to examine this big, thick file of documents and try to match up the requests with the correspondence

and decide whether or not the request was honored or wasn't honored when it has nothing whatever to do with this.

I will sustain it as essentially irrelevant.

I notice that on the deposition, page 14, Mr. Fish said that "Here is the whole file, and this is everything. Rather than pick out anything, we will mark the whole file."

I don't think that is any way to try the case at this point.

MR. WARNER: May it please the Court, may I have this marked for identification? It is out of that file. We expect to pull just two pieces of paper out, and we believe they will be relevant.

May I have this marked for identification?

THE CLERK: Your Honor, I don't know what letter to give this because there are four things I can't find. Including the four I can't find, this would be AC then.

THE COURT: You will look through all the ABS reports. Just leave the right number of letters open and we will try to figure it out.

(Defendant Weyerhaeuser AC and AD marked for identification.)

MR. WARNER: I offer AC in evidence.

THE COURT: Has anybody identified this?

MR. WARNER: Yes, the clerk has marked it AC.

THE COURT: I know, but you don't stand up in court and say, "I offer it."

Has any human being testified as to what it is?

MR. WARNER: It came out of the Baumgartner file, your Honor.

THE COURT: Well, is it referred to in the deposition somewhere?

MR. WARNER: It is part of the file that the Court would not take in its entirety, so we are trying to select one or two relevant matters out of it.

THE COURT: It is part of that thing that was marked E-7, is that it?

MR. WARNER: Yes, your Honor.

THE COURT: All right, we will see if there is any objection to that.

(Mr. Warner hands to Mr. Maloof.)

MR. MALOOF: Judge, I renew my objection to this. First of all, it has never been identified by any witness. If it had been, I could have asked a question or two about it.

Secondly, I do not see the relevancy. It does

not talk about this valve or anything like that.

THE COURT: May I see it, please?

(Handed to the Court.)

MR. WARNER: I am talking with particular reference to thethird item there, your Honor.

THE COURT: (After examining) You do have some witnesses, live witnesses, do you?

MR. WARNER: No, your Honor.

THE COURT: You do not have live witnesses?

MR. WARNER: No, your Honor.

THE COURT: There is no way you can call a man to explain these things?

MR. WARNER: In the Admiralty practice, we flew them in from the Coast some time ago. The stuff was marked up and I did not anticipate these technical objections.

THE COURT: I want to simplify this if I can, but I have to pay a little attention to the rules.

I gather that this paper is nowhere mentioned as such in the deposition?

MR. WARNER: No, your Honor.

THE COURT: You say that this came out of a great, big file which Mr. Fish said was the file of the repairs and which Mr. Baumgartner said was the file of repair orders in his office.

MR. WARNER: Yes.

THE COURT: I do not have the slightest doubt that what you say is correct, and that it did come out of that file, but it is quite meaningless by itself. It may have some bearing because it talks about pumps. Maybe they are the pumps that pumped the water out of the bilge, but I don't know that.

I think you will just have to bring somebody here who knows a little bit about this case and explain it, if you want to get these things in evidence.

I will have to rule according to my lights.

I will have to sustain the objection unless it is explained.

MR. WARNER: Shall I proceed, your Honor?

THE COURT: Well, if you can, if you have any witnesses.

MR. WARNER: Are you finished, Mr. Maloof?

MR. MALOOF: I have rested, Mr. Warner.

MR. WARNER: I make the usual motions pursuant to Rule 41 that the complaint of the plaintiff should be dismissed because on the facts and on the applicable law they failed to make out a prima facie cause of action.

THE COURT: Decision reserved.

MR. DE ORCHIS: Have you rested?

MR. WARNER: Weyerhaeuser rested.

MR. DE ORCHIS: I could make my motion now, but I have one short witness, a live witness I am happy to say, with one document that I would like to get into evidence. He has to go back to Florida, so I ask the Court's permission to put on that witness, and that also will be my whole case, and then make my formal motions afterwards -- unless your Honor prefers that we make our motions now?

THE COURT: It won't take you very long to make your motion, if you want to do it.

MR. DE ORCHIS: I move that the plaintiff's complaint -- not the plaintiff's complaint, but certain of the plaintiff's causes that should be dismissed for failure to support them with the prima facie case.

I direct my motion not to the plaintiff's case for ordinary cargo damage and the delivery of cargo in good condition to the carrier, but I direct my motion to that cause of action in which the plaintiff alleges that the defendants wilfully and with premeditation damaged the plaintiff's cargo, and which the plaintiff alleges that the ship was known to be grossly unseaworthy.

That cause of action which he hopes to break the limitation is the cause of action to which I direct

my motion, on the ground that at least as to my client, New York Navigation Company, Inc., there has been not a scintilla of evidence that my client had any knowledge about this ship leaking at any time until we found out that she had arrived at Moji, Japan, and had water in her.

There is absolutely no evidence that we had any knowledge that she had water in her even at Panama, and so that particular cause of action should be dismissed as to New York Navigation Company, because no one has said in this courtroom at any time that we did anything wrong in this case. Everything has been the shipowner and his maintenance of the ship and how he ran the ship, but my client did nothing. There is no evidence that he did anything or had knowledge of any of this.

So that particular cause of action should be dismissed.

THE COURT: There is only one count in this complaint, Mr. DeOrchis. If you are moving to dismiss the action you are moving to dismiss the only count there is.

MR. DE ORCHIS: Then I move to dismiss that count, if the Court interprets it as one count -- I move to dismiss it as against my client.

THE COURT: You move to dismiss the whole action, don't you?

MR. DE ORCHIS: Yes, as against my client.

THE COURT: Decision reserved.

MR. DE ORCHIS: I also move with respect to the---

All right, that is the end of my motion at this time.

May I proceed with the witness?

THE COURT: Go ahead and call your witness.

MR. DE ORCHIS: I have a witness from the National Cargo Bureau.

Mr. Record, please.

MR. MALOOF: If it please the Court, I have a technical objection because Mr. DeOrchis has not notified us about Mr. Record until just before lunch; but I have been told by Mr. DeOrchis that he was to object to a witness I might put on in rebuttal because I did not tell him until Monday morning.

Now I think these technical objections ought to be waived. I want to hear what Mr.Record has to say, and I am sure he would like to hear what my rebuttal witness has to say, if we can discuss it in those terms.

THE COURT: Do you object to him calling this witness?

MR. DE ORCHIS: May I explain?

MR. MALOOF: I will, if I cannot put my rebuttal

witness on, Judge.

MR. DE ORCHIS: We will cross the rebuttal bridge when we get to it, but as to this witness he made a statement that I failed to notify him. He is quite correct that I failed to show Captain Record -- what I did notify him a week ago was that Mr. De Groote of the National Cargo Bureau would testify, inasmuch as he is the man who signed this certificate. When I called Mr. De Groote he told me yes, he signed the certificate but the man who actually went on the ship was Captain Record, so knowing that he would object to Mr. De Groote we called the man who actually went on the ship after we found him.

THE COURT: Went on the ship when, where?

MR.DE ORCHIS: This is at Tampa.

MR. MALOOF: This man went aboard in Panama?

MR. DE ORCHIS: No, in Tampa.

MR. MALOOF: Judge, he is not even in the pre-trial memorandum. I don't believe anybody from this company is.

Could you point it out to us, Mr. DeOrchis?

This is a complete surprise, your Honor.

MR. DE ORCHIS: I notifed him a week ago.

MR. MALOOF: I have a strong objection to the witness testifying.

THE COURT: Don't talk at once.

Now, did you list in your pretrial memorandum a witness named DeGroote -- is that it?

MR. DE ORCHIS: No. In the pretrial memorandum at that time we did not know about the National Cargo Bureau, but a week or more ago I wrote a letter, just as we have been exchanging letters the last week -- I have gotten three or four from Mr. Maloof about witnesses, so I sent him one about Mr. DeGroote and three others, and, as I said, when I located Mr. DeGroote he said, "I signed the certificate," which is what I want to get into evidence, "but I am not the man who actually did the job."

So I went out of my way to actually find the man who did the job so he would not object. Now he is objecting anyway.

MR. MALOOF: There is nothing in the pretrial memorandum about National Cargo.

MR. DE ORCHIS: Not the pretrial memorandum; a letter I wrote to you a week ago.

MR. MALOOF: But you had no authority to do that.

MR. DE ORCHIS: You sent me three or four letters.

THE COURT: All right, in the exercise of the Court's discretion I will allow you to call this witness.

MR. DE ORCHIS: May I mark this for identifica-

tion.

(Defendant New York Navigation Exhibit C for identification.)

BYRON LEE RECORD, called as a witness on behalf of the defendant New York Navigation Corporation, being first duly sworn, testified as follows:

MR. DE ORCHIS: If your Honor please, this Defendant's Exhibit C for identification is the kind of letter that Mr. Maloof and I have been exchanging the last week or two, to notify about the names of witnesses (handing). Mine was similar to that, except I do not have it in court.

(The Court examines.)

MR. MALOOF: If it please the Court, I believe Mr. DeOrchis has two people here from the National Cargo Bureau. May I ask that the other one be requested not to sit in the courtroom during his testimony?

THE COURT: No; you may ask, but the application is denied.

Let us go ahead.

DIRECT EXAMINATION

BY MR. DE ORCHIS:

Q Captain Record, would you tell us, have you ever

gone to sea?

A Yes, I have.

Q What license do you hold?

A Master's unlimited.

Q How long have you held a master's license?

A Since 1950.

Q Have you ever sailed on board Liberty ships?

A Two trips.

Q What was your job in 1966-1967?

A I was associated with Captain DeGroote as a surveyor for the National Cargo Bureau in Tampa.

Q Will you tell us what is the National Cargo Bureau?

A It briefly is a non-profit organization that has been formed to assist vessels and various owners and interested parties in various phases of cargo operations.

Q Does that include the loading of cargoes on ships?

A Not the stevedoring part, but the stowage of it -- where you put it or how much you put on -- the preparation of the holds before loading, things of this nature.

Q Did you have anything to do with the loading of a shipment of fertilizer on the John Weyerhaeuser in 1966?

A Yes, I did.

Q And would you tell us where, in what city, in what

place?

A I first inspected the John Weyerhaeuser at Port Tampa, the ACL Line phosphate loading elevator on the morning of December 22.

Q Would you tell us what you did?

A I went on board, contacted the chief officer, and in his company or with one of the other mates -- I don't recall which one it would be -- a representative of the ship -- and I looked at No. 2 'tween deck lower hold, No. 1 'tween deck lower hold and No. 5 'tween deck lower hold.

Q Did you go down into No. 3 lower hold?

A Yes, I did.

Q Actually, physically go down there?

A Physically I was down in No. 3 lower hold.

Q Will you tell us what you did when you got into No. 3 lower hold?

A I looked all around the compartment in reference to how clean it is; if it is not clean, how much has to be done to prepare it for this cargo that is going to be loaded.

I look at the bilges to see only that they are covered, you know -- covered with burlap over the strainer plates -- in general, to see if the hatch is clean enough to receive the cargo that they planned on loading.

Q Now, who appointed you to do this?

A We were ordered through the vessel's agent in Tampa.

Q Was there anyone with you at the time you went down to that No. 3 lower hold?

A There would have been a ship's officer -- I am not sure -- probably the chief officer, but I am not sure which one it would have been, because there was a second or third mate also.

Q Are you familiar with the type fertilizer that was going to be loaded on this ship?

A Yes, I am.

Q Had you loaded or worked with this type of cargo many times before?

A Yes, I had.

Q Will you tell us what it looks like?

A It is like bird shot, gray color -- BB's may be a better identification.

MR. DE ORCHIS: May I have this marked for identification, please.

(Defendant New York Navigation Exhibit D marked for identification.)

BY MR. DE ORCHIS:

Q Would you please examine the material that is in this bottle, and tell us whether this is what it looks like,

the fertilizer in question (handing)?

A I cannot open the jar. In appearance --

Q Just by visual appearance, is this what it looks like?

A It could be granular triple super phosphate, or I will inject another one that is of a similar nature -- diammonium phosphate, the characteristics and size and so forth, they appear the same.

Q And the type of fertilizer that was loaded on the John Weyerhaeuser, did it look like the material in this bottle?

A It could very well have been the same material, I don't know.

MR. DE ORCHIS: I will offer this in evidence (handing).

MR. MALOOF: No objection.

THE COURT: Received.

(Defendant New York Navigation Exhibit D received in evidence.)

BY MR. DE ORCHIS:

Q Captain, can you tell us whether this type of fertilizer is susceptible to damage by water?

A It is highly susceptible to damage by water. After general cleanliness of the compartment, one other

main factor we insist on is that it is absolutely dry where it is going to go.

Q When you went down into the No. 3 lower hold of the John Weyerhaeuser in Tampa did you check to see that the hold was absolutely dry?

MR. MALOOF: I will object to the leading questions, your Honor.

THE COURT: Yes, don't lead him. You can ask him what he did when he went down there.

Q What did you do in connection with checking whether the hold was dry?

A Well, I looked for moisture, or traces of water. There was none.

Q Was there any leaking in the hold?

MR. MALOOF: What was that question?

(Question read.)

A There was no indication of anything leaking because, I repeat, there was no moisture present.

MR. MALOOF: That is another leading question.

Q Were there any --

THE COURT: He has answered.

Q Were there any pipes in the hold?

A Yes, there are two pipes in the after end.

Q In the after end of what?

A No. 3 lower hold.

Q Can you tell us what those pipes were?

A They are drainpipes or soil pipes from the drainage or soil system of the ship.

Q Did you look at those pipes?

A Probably not, because there was no water below, so I probably did not look.

Q There was no water below where -- on the floor of the hold?

A On the tank tops, on the ship's side. There was no trace of moisture anywhere.

Q On that day when you were on the ship where was the ship? I mean, was it at a dock or was it at anchor?

A No. I originally went on the ship at anchorage off the elevator at Port Tampa.

Q And during the time that you went on the ship inspecting it was the crew on board?

A Yes, they were.

Q Did you ever go back on the ship after that first visit?

A I was in this compartment two more times. It was not properly cleaned and I returned after the ship came to the dock about 2 o'clock in the afternoon. The hatch was not finished cleaning and I stayed there until the crew

completely cleaned the hatch to my satisfaction.

This was a little after 2.

Q And you are speaking about No. 3?

A We are referring only to No. 3.

Q During this second visit and during all the time that you were there was there any sign of any leakage in that compartment?

A There was not.

Q Did you issue any certificates or reports in connection with your inspection of that No. 3 lower hold?

A Yes, I did. The ship would have what we call a loading pass. We certify that the compartment is ready to load whatever cargo is going in there.

Q I will show you --

MR. DE ORCHIS: May I have this marked for identification.

xx (Defendant New York Navigation Exhibit E marked for identification.)

BY MR. DE ORCHIS:

Q I show you Defendant's Exhibit E marked for identification and I ask you if you can identify this document (handing)?

A This is not the loading pass we give to the ship. This is given to the representative after the ship has sailed.

Q What is this document?

A A certificate of loading -- just what it says. It is approved that we consider the loading was done in a prudent fashion and in good order.

It lists the quantity, where it is going, and the draft of the vessel when it sailed.

Q The other document that you mentioned, the pass, do you have a copy of that?

A I would not. I can tell you from my notes what time that No. 3 was marked "Passed," but this is the ship -- this stays on board the ship. It is a pen copy -- hand-written copy.

Q Do you have your notes with you?

A They are in the back there.

Q Back in the courtroom?

A Yes.

Q Do you want to get them, please?

(The witness leaves and returns to the witness stand.)

A (After examining) At 3.30 p.m. No. 3 was ready for loading."

Q And it was passed at that time?

A Yes. That time would be marked on what we call the vessel's loading pass.

Q And who do you give that to? Who do you hand it to?

A The chief mate in most cases.

Q And in order to pass can you tell us what was it that this vessel had to accomplish? What was it that you checked before you issued this pass?

A Well, originally when I looked at the hatches there was a small amount of debris, splinters from wood -- just the usual small trash you will get when a ship carries general cargo.

Prior to loading the new cargo it should be quite clean.

All right, I see here that he had some loose scale which he had to sweep up also.

Q Did you examine the bilge wells in No. 3?

A Not the wells; only that the mate had covered the strainer plate.

Q What had the mate covered the strainer plates with?

A Well, I don't specifically remember. I would assume burlap because burlap was used in the forward end of the hatch, so I would assume it was burlap.

THE COURT: What is a strainer plate?

THE WITNESS: Where the bilge weld that we have

been talking about -- the actual opening is protected by a plate with holes in it to stop big matter from going into the well.

THE COURT: You would call that a cover of a well?

THE WITNESS: Yes, just like the strainer plate in a sink.

Q Does this strainer plate have little holes in it for the water to run through?

A That is correct.

Q But it keeps big particles from going into the bilge well?

A That is correct.

Q Now, what was the purpose of the burlap on top of that?

A I would say it is only to keep the material out so when the cargo is discharged you have a small job to clean the bilge. None of the cargo that is in the hold has gotten into the bilge, so therefore you do not have to remove it.

Q How many times did you go down into No. 3 during your visits, both the first and subsequent one to the ship?

MR. MALOOF: Excuse me for interrupting. May we mark the notes the witness used for identification?

THE COURT: You keep them handy.

(Question read.)

A Three different times. When I say three different times, I went down, checked how the cleaning was going, then came up. Then I came back at 2:20, as a matter of fact, reinspected No. 3, that was the first hold they wanted to load, and it wasn't ready yet, so then I came back up and then at 3:30 it was ready so I would have gone down and looked again.

Q At any of the times that you were down in the hold, was there any smell of sanitation -- sanitation-type smell down in the hold?

MR. MALOOF: I object to the terminology. It is very vague.

THE COURT: Did it smell like sewage down there?

THE WITNESS: No, it did not.

BY MR. DE ORCHIS:

Q If you had a smell of that type would you have taken notice or taken any action with respect to it?

A In the absence -- well, to be truthful, I never

smelled it in a cargo hold, so I don't really know what I would have done. But perhaps in the absence of any moisture anywhere I would have asked the chief mate where did he think it was coming from.

Q You are saying it would have been very unusual to smell anything like that?

A Yes. On a large scale as you speak of.

Q Is this material that we have marked as Defendant's Exhibit D, this type of fertilizer -- where does it come from?

A Would you rephrase the question? That is vague, really.

Q I mean what part of the United States does it come from?

A It is manufactured from what they call land pebble phosphate that is strip mined in Florida.

Q Right from the surface of the land in Florida?

A But that is the raw product. This is a finished product.

Q They make these little pellets from it?

A Right.

Q As a finished product, as it was shipped, would it absorb moisture?

A Very much so.

Q Would it absorb moisture, just the humidity, heavy humidity in the air?

MR. MALOOF: Objection. This man hasn't been qualified as an expert in that area, I don't think. A chemist would have to answer that.

Q How many years --

THE COURT: I will let him lay a foundation.

Q How many years have you been examining ships for the shipment of this type of cargo?

A Approximately eight years.

Q And during that time have you had any experience with this type of cargo getting wet?

A Yes.

Q And absorbing moisture?

A Right.

MR. MALOOF: I object to the leading questions.

THE COURT: Overruled.

Q Let's assume that one of those sanitation lines up in the lower -- the top of the lower hold, the one on the port side, was leaking water after this cargo was loaded into that lower hold, and water started to drip or fall down on it, would the water run right through the cargo down to the bilge?

MR. MALOOF: I object to that. I don't think anybody can answer it.

THE COURT: He can answer, and you can cross examine.

Do you have any opinion on that?

A I would say that the water would probably never reach the bottom.

Q Why not?

A Because as the water comes in it absorbs more and more and more, and you end up with nothing but slush or mud or whatever you want to call it. I mean this is most apparent in my own fertilizer I use at home, if you accidentally get some of it wet.

Q Based now on your experience as a ship's master and mate, if you have a mixture of this material and water, and you said it forms a slush, if you have a mixture of that material and water, will it show up in the sounding pipe of a bilge well?

A I don't know, but I would say in my opinion that it wouldn't.

Q Why not?

A There is -- as I say, the water that is coming in the top never reaches the bottom as water, it is mud and muck.

MR. MALOOF: I move to strike the testimony

THE COURT: Motion denied. I will let him finish his answer.

A As I say, in my opinion the water as water, or as a liquid, would never reach the bottom as a liquid.

Q Would it get through that burlap cover on the strainers of the bilge wells?

A I don't think there would ever be any water --

MR. MALOOF: May it please the Court --

THE COURT: Please don't interrupt. You can object to the question, and you have been overruled.

MR. MALOOF: May I make an objection on the record?

THE COURT: Yes.

MR. MALOOF: I distinctly remember Mr. De Orchis saying he had a witness to identify a certificate. I object to him going into these things when that is what he represented to the Court.

THE COURT: The objection is overruled. Any motion you have to strike is denied.

It seems to me everybody has agreed that this was highly soluble and it turned into slush. I don't know what all this excitement is about. It doesn't surprise me a bit.

I don't know what bearing it has on the case, but if you think it is helpful I will let you prove it.

MR. DE ORCHIS: The bearing it has on the bilge soundings, why you might have no water in the bilge sounding and yet have water in the compartment.

THE COURT: Is it not true when they finally discovered this situation this fertilizer was all slush, just as he said?

MR. DE ORCHIS: Yes, but the bilge soundings in the deck log don't show 14 or 15 feet of water, and he is explaining why you don't get that. It wouldn't read in the bilge tube because it wouldn't rise in the bilge tube. Water would seek its level but not slush. This is the purpose of the witness.

THE COURT: You are arguing there was really more water there than the soundings showed.

MR. DE ORCHIS: The deck log sounding only shows a few inches until they practically arrive in Japan. Yet there was water in the hold. What I am trying to show by this -- what I am trying to find out from this witness is could you have water in the hold and yet it wouldn't show up in your sounding tube if this were the cargo in the hold, and he is saying that with this type of cargo you wouldn't get a reading in your sounding

tube, not a true reading, because it is slush.

THE COURT: All right. I will let him testify.

BY MR. DE ORCHIS:

Q Assuming we have, say, 250 tons of this cargo in No. 3 so that it is right up practically to the top of the lower hold and right up into the tween deck, right up to the top of the hatch covers, and water starts getting into the cargo in the lower hold from a sanitation -- from the overboard discharge valve on the port side aft and water starts pouring in. How long would it be before you would know that there was a leak there with this type of cargo?

A I don't know. Possibly you would never know until you opened the hatch. I mean that possibility exists.

Q The notes that you brought with you, and which you have before you, when were those notes made?

A At the time. By that it may not have been done exactly chronologically when I was there at 2:20, I may not have put it in the book at 2:20, but when the day was over I sat down and said this is what I did today.

Q The certificate that we have marked for identification, E for identification, has a signature on it

of Mr. De Groote, G. De Groote. Can you tell us who is Mr. De Groote?

A He was the senior surveyor at this time. I worked for him.

Q Why does his signature appear on the certificate rather than yours?

A That was his policy.

MR. DE ORCHIS: I offer the certificate in evidence.

MR. MALOOF: No objection, your Honor.

MR. WARNER: No objection.

THE COURT: Received.

(Defendant New York Navigation Exhibit E received in evidence.)

MR. DE ORCHIS: I have no further questions, your Honor.

CROSS EXAMINATION

BY MR. MALOOF:

Q Mr. Record, how many times were you aboard this ship for the purpose that you are talking about?

A What purpose do you mean, prior to loading or as long as the ship was in Tampa?

Q To examinethe holds, as you said, for the loading of the phosphates.

A Prior to loading.

Q Were you aboard after loading?

A Yes.

Q Did you go into No.3 hold after loading?

A I couldn t.

Q What were you doing aboard the ship?

A Checked the draft, the stowage.

Q It had nothing to do with the holds after the loading?

A No.

Q You were aboard three times before loading?

A Right.

Q And on what dates, sir?

A It was all on the 22nd.

MR. MALOOF: Could I have that book marked for identification, Judge?

THE WITNESS: Will I get it back?

MR. MALOOF: I think eventually.

(Plaintiff's Exhibit 79 marked for identification.)

BY MR. MALOOF:

Q What was the first day that you went aboard this ship, sir?

A The 22nd.

Q The 22nd of what month?

A December.

Q Do you remember the time of day?

A It's in there.

Q Do you need your book for that?

A Approximately, I believe it was 11:30 in the morning; before noon.

Q How long ago was this?

A Six years.

Q Do you remember details that far back?

A To a certain extent, yes.

Q Without your book?

A No.

Q You would have to rely upon your book, right?

A Right.

Q Okay.

The first time you went aboard was 11:30?

A Yes.

Q Do you know the depth of this ship from the weather deck down to the tank tops in the No. 3?

A Approximately 37 feet, I believe.

Q About 37 feet?

A Yes.

Q There was a tween deck in this ship, is that

right?

A That is correct.

Q Could you explain to the Court what that means in relation to the lower hold?

A That is another floor or level about two-thirds of the way up from the bottom to the top of the entire hatch.

Q That means it is like a two-story house, right, by comparison? Excuse the expression. That means you have got a ceiling on top which is the floor of the tween deck, is that right?

A The hatch opening you have and around you have wings which would be the tween deck, or another floor, if you want to call it a floor.

Q And in that deck, the tween deck deck, you have a hatchway?

A That's correct.

Q What tools do you take down with you into the lower hold when you go down?

A Mostly, if the hatch is closed, a flashlight.

Q If you didn't have the flashlight what could you see?

A Nothing.

Q So it is a good thing you had it?

MR. MALOOF: I will withdraw it.

THE COURT: No light down there at all?

THE WITNESS: If the hatches are closed there is no light.

THE COURT: When you went down there on the 22nd of December were the hatches closed?

THE WITNESS: I don't know, your Honor. I would guess that they were the first time. I would say not guess, since it was an American ship and they don't do longshoreman work like some of the foreign ships, I would say that as an accommodation I went down in the hatches with the covers closed. I don't know.

BY MR. MALOOF:

Q When were the other two times you went aboard, sir?

A 2:20, and I stayed on board until No. 3 got ready at 3:30, and then by 4 o'clock the other hatches were loaded.

Q All three times were on the same day?

A Yes.

Q I see. I misunderstood you. I thought it was different days. My mistake.

So the second time was in the afternoon then, and the third time was when, sir?

A The same period of time. At 3:30 the hatch was ready, No. 3.

Q I notice on the certificate that has been marked New York Navigation's Exhibit E, which is, of course, your certificate of loading, there is a comment that "This certificate is not a certificate of seaworthiness and relates only to the following cargo." Is that on all your certificates?

A That is correct.

Q I see on the bottom of the certificate it says "$50." Would you tell us what that is, please?

A That is the fee for the certificate.

Q Is that the fee that National Cargo Bureau charged?

A Right. If that $50 is what is there. I can't see it from here.

Q I will show it to you. It starts off with $35, and then it talks about additional charges. Would you explain that to the Court? Break that down for us.

A The fee is by the amount of cargo. The 12.50, which is for me going to anchorage. The 2.50 is transportation. The total is $50.

Q The actual inspection is $35?

A That's correct.

Q Do you have to send part of that to the home office in New York?

A With that status, yes.

Q How much of that goes up to New York?

MR. DE ORCHIS: I don't see the relevancy of any of this, your Honor, how much of the fee is sent to New York.

THE COURT: I will allow it as cross examination.

BY MR. MALOOF:

Q Do you know the answer to that, sir?

A Yes, I know the answer.

Q Would you answer it, please?

THE WITNESS: Should I, Judge?

THE COURT: Is there anything secret about it?

Q Would you rather not answer that? I won't press you.

A Well, I --

MR. MALOOF: I withdraw the question.

THE WITNESS: Thank you.

Q How long a time were you aboard the ship the first time, sir?

A Twenty minutes less than two hours.

Q And the second time?

A The second and third trips into No. 3 was at the same time. I was on the ship from 2:20 to 4 o'clock.

Q And the third time?

A No, the third time is included.

Q Those two are put together?

A Yes.

Q When you are aboard do you talk to the first mate, captain, and so on?

A Usually the chief officer.

Q You didn't talk to Captain Dumble this trip when you were there?

A I can't say.

Q Did you bring a ladder aboard with you?

A A ladder?

Q A ladder.

A No, sir.

Q Was there a ladder in No. 3 lower hold?

A Yes, sir.

Q There was one there?

A Yes, sir.

Q Where? A ladder, you know?

A Yes, to go down.

Q I don't mean that. The ladder you used when

the hatch was closed, I see.

A Yes.

Q You are talking about the permanent iron ladder?

A Yes.

Q You didn't bring a wooden ladder with you?

A No, sir.

Q This permanent iron ladder is not near this clapper valve, is it?

A No, sir.

Q Do you know how high that valve is from the tank tops in the No. 3 lower hold?

A I am not an expert on the Liberty ship, but I would say 20 to 24 feet.

Q Pretty high up?

A Oh, yes.

Q Do you think you would have a good view of it from the tank tops?

(Pause.)

MR. MALOOF: I withdraw the question.

Q Now, did you sail as a master?

A Yes, sir.

Q For how long?

A About seven years.

Q For what company?

A Isthmian Lines and States Marine.

Q I think you mentioned that you wanted a clean hold for trisodium phosphate. A clean hold you wanted for the trisodium phosphate?

A Granular triple superphosphate.

Q Is that the right name for it?

A Yes, sir.

Q How clean did you want it? Not clean enough to eat off of, I take it?

A A ship that age you wouldn't get that clean. You would -- well, the material is approximately worth $70 a ton, so you want it clean.

Q You knew how old that ship was at that time?

A Yes.

Q How old was it?

A Twenty-two years old.

Q Did you look at the bilges to see that they were covered properly?

A Yes.

Q And they were?

A Yes.

Q Did you notice that on the first trip?

A If they hadn't been they would have been.

Q You would have seen that that was done?

A Right.

Q I think you said that this ship didn't smell like sewage in the No. 3 lower hold. Do you have it inyour notes that way?

A There was no mention, so I -- because of the business of the port most of this is a negative. If nothing is there, it's good. Do you understand what I mean.

Q In other words, if it isn't in there that means it smelled very sweet and everything?

A There was no abnormal smell.

Q It smelled like a 22-year-old ship, is that right?

A That's right.

Q Not any better?

A I wouldn't be in a position to judge the smell.

Q How many shipments of fertilizer do you think this old ship had carried before 1966?

A At that time I don't know that she had ever carried any fertilizer.

Q You don't know the answer to the question, do you?

A No.

Q It is in the record it carried a full load to Madras a trip before. Ammonium sulfite, that is a fertilizer, isn't it?

A The same family.

Q I hand you a jar, New York Navigation Exhibit D, and ask you to smell that. Take a deep swiff.

What does that smell like?

A Ammonia, to me.

Q It smells like sewage to me.

I show you Plaintiff's Exhibit 66, which is a photograph, and ask you to look at the bulkheads of that ship and ask you if that is a normal 22-year-old Liberty ship.

MR. DE ORCHIS: If your Honor please, we didn't qualify the witness as an expert on the Liberty ships, but if he wants to qualify him I wouldn't have any objection.

THE COURT: Can you answer? Do you know whether it is or not?

THE WITNESS: The black-and-white really is -- it doesn't look good, but it may be only the picture.

BY MR. MALOOF:

Q What was that answer, please?

A I say youcan do a lot of things with a picture

that is not truly representative.

Q Do you think something has been done with that picture?

A I don't know. This doesn't look good, but my impression of the same area, if I looked at it in person, might be different from the picture. Do you understand?

Q Yes.

Mr. Record, I think you have testified that -- stop me if I am wrong -- but when water comes into this phosphate it never reaches the bottom?

A That would be my opinion.

MR. MALOOF: No further cross.

THE COURT: Anything else?

CROSS EXAMINATION

BY MR. WARNER:

Q Captain, the pier that the John Weyerhaeuser loaded at, is the water in which the vessel vloats, washes alongside that pier, the same -- I mean the salinity, is it the same as the water in the Atlantic Ocean?

A No.

Q Is it fresh water?

A I checked it two days after this loading we

are talking about and it was 10195. This is on the 27th. I had a ship that was close to her marks, and I have the draft, the salinity, at that particular time. In Tampa the change is seasonal, not day to day or tide to tide but seasonal, depending on the precipitation inland.

Q So that the Weyerhaeuser, where the draft was taken, would be deeper alongside the dock than when she got out into the Atlantic and the salt took its effect, is that correct?

A Approximately an inch and a half, I would say.

Q An inch and a half?

A About.

Q Did you take the draft of the John Weyerhaeuser when she sailed?

A No, I did not. The entry I have here is "Finished John Weyerhaeuser, 3 and 5 full." That means literally what it says, full, plenty of lift.

Q What does that mean?

A It means he has plenty remaining draft if he wished to load more cargo.

Q The group report, does that have the drafts?

A Yes, sir.

Q Do you recall roughly what it was?

A Roughly 19 and 29.

Q Nineteen feet forward and 29 feet aft?

A This is rough, within one or two inches.

MR. WARNER: Thank you, Captain.

BY MR. MALOOF:

Q Captain, is there a difference between the salinity of the water at Tampa and the salinity of the water at, say, Cristobal?

A It could be.

Q Would you please answer the question I asked you. If you don't know --

A I don't know.

Q That is it.

How about the salinity of the water at Balboa?

A I have never taken the salinity at Balboa.

Q How about the salinity of the water at Moji, Japan?

A Moji should be sea water.

MR. MALOOF: Thank you.

THE COURT: Is that all?

MR. DE ORCHIS: No further questions.

THE COURT: That is all, Mr. Record.

(Witness excused.)

THE COURT: Do you have any further witnesses?

MR. DE ORCHIS: I have no further witnesses.

THE COURT: Do you rest?

MR. DE ORCHIS: I rest at this point, yes, your Honor.

THE COURT: All right.

MR. DE ORCHIS: The captain would like to have his notes, if he can have them.

THE COURT: They are looking at it for the moment. Will you wait until they satisfy their curiosity.

All right. Now, we still have a loose end here, namely, the date when the freight was paid. Has anybody found that out yet?

MR. DE ORCHIS: No.

THE COURT: Do you have any rebuttal?

MR. MALOOF: I have one witness, your Honor.

MR. DE ORCHIS: We have also the cross claim against the shipowner for indemnity and counsel fees, but there are no witnesses and no evidence involved there, just a statement for the record. In other words, I have rested as against my defense in the plaintiff's case. I do have a cross claim against the defendant Weyerhaeuser for indemnity, and as to that I have no evidence other than what is in the record already. And as to the attorneys'

fees we ask your Honor just to determine whether we are entitled to attorneys' fees, and as to the amount we can settle it between ourselves or at a later stage present evidence. Usually we have always been able to agree on these things as to the amount.

THE COURT: I will treat that in the same way as the amount of damages, reserve for future determination.

MR. DE ORCHIS: Yes, your Honor.

I don't want to clutter the record if I don't have to, but I want to say we have several letters we have written to defendant's attorneys putting them on notice when we were involved in this that we would hold their client liable, asking them to come in and defend the action, and I think Mr. Warner would stipulate that we did put him on notice, we did ask them to take over the action, and I won't have to put all these letters in.

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MR. WARNER: There is no question but that he asked us to come in and defend the claim, and then he put in a cross claim -- that is all.

MR. DE ORCHIS: With that I will rest my claim for indemnity also.

MR. WARNER: Of course we deny legall that they are entitled to attorneys' fees or indemnity.

THE COURT All right, what is next?

MR. MALOOF: I have one short witness, your Honor, in rebuttal.

The plaintiff calls Mr. Keeler.

MR. DE ORCHIS: Your Honor, what is there to rebut?

THE COURT I was wondering myself what there is to rebut -- that Mr. Record did not go down in the hold?

MR. MALOOF: Mr. Warner did put in the rest of the deposition, and there is a comment in there by the captain about the green lumber.

THE COURT: In the deposition?

MR. MALOOF: Yes, in the rest of the captain's deposition that was read into the record -- and that was something about the green lumber causing it -- and this witness will discuss that lumber point. I won't be long, if your Honor please.

MR. DE ORCHIS: If your Honor please, there has been no issue whatsoever, and for the record I would like to state what has happened here.

I had an expert witness. I deliberately did not call him because I did not want to have rebuttal here.

Now we have not raised any expert witnesses. We raised no issues whatsoever. His witness he had in the courtroom since the first day, and he did not deliberately call this expert witness but called the others, and now he wants to save him to have the last word, and I object strenuously to this --

MR. MALOOF: No, Judge, I resent this.

THE COURT: Don't interrupt.

MR. DE ORCHIS: This is improper rebuttal. There is nothing -- no new issue which we have raised. We have only denied what he has claimed on his direct evidence. There is nothing to rebut in this case.

MR. MALOOF: Mr. Warner put the balance of the deposition in evidence.

THE COURT: When did he do that?

MR. MALOOF: It was on direct, but still it is his case, your Honor -- it is part of his case.

THE COURT: Mr. Warner offered no evidence whatever. He tried to get in evidence certain exhibits which

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he had previously offered, which were exhibits to the deposition of one of these people, and you objected, and I sustained your objection, so he did not get anything in.

He called no witnesses. I told him in so many words that I thought he ought to call some witnesses, and much to my amazement he rested. He did not put in anything.

Now there is certainly nothing to rebut so far as he is concerned, and all that Mr. DeOrchis did was call this man that went down in the hold, and I suppose you are not going to try to rebut that, so there isn't anything to rebut.

MR. MALOOF: In that case, your Honor, then I will excuse Mr. Keeler --

THE COURT: All right.

MR. MALOOF: -- if there is nothing to rebut.

THE COURT: (To Mr. Keeler) Saves you the trouble.

MR. MALOOF: Judge, may I offer once again these documents. This is the London Salvage. I want to close this case out.

I think these are at least admissions against interest with Weyerhaeuser saying there is one toilet for each clapper valve, and possibly a shower connected with it. I think they should go into evidence, especially since we lost a witness on account of it.

THE COURT: I have sustained --

MR. MALOOF: Will your Honor take them for what they are worth?

THE COURT: I have sustained an objection to certain documents that he offered on the ground that they were hearsay documents, and I could not accept them for the truthof the statements contained in them.

Now you said something about calling a witness, and I will give you a chance to call the witness, but better get him up here right away because we want to finish this case today.

I still think you ought to be able to agree on how many toilets drained into that pipe. If you cannot, nobody will tell you.

MR. MALOOF: Nobody will tell me because I don't own the ship or anything, and I do not know how many toilets drained into it.

Can we use this as an admission against interest? This is from Weyerhaeuser to London Salvage.

THE COURT: Better get that man up here and perhaps put in some competent proof.

MR. MALOOF: May I have a minute, your Honor?

THE COURT: Yes.

(Mr. Maloof confers off the record.)

MR. KENNEDY: Your Honor, may I be heard for just

a moment?

THE COURT: Yes.

MR. KENNEDY: As we read both the Telex and the letter, they contain the substance of a report that the writer or the sender received from the owner of the vessel, and that is Weyerhaeuser. It is the plaintiff's contention that these are admissions by Weyerhaeuser as to conditions on board ship, and I think as such they are admissible.

THE COURT: It would be so much better if you had the witness here who could explain what these things are.

One of them is unsigned -- I do not even know who wrote it.

MR. MALOOF: It is just the one document that we are down to, your Honor, and we have subpoenaed these people. We intended to have them here. We will have one here and I do not think it will be too long, I hope.

I have to get to the airport, too, to meet my son, so I am just as anxious as you are.

THE COURT: You are getting him up here now?

MR. MALOOF: The phone call is being made -- he is in downtown Manhattan.

THE COURT: Is there anything else?

MR. MALOOF: And he is the one who sent that cable when he worked for London Salvage. I assume he will identify

it.

Will you stipulate it and save us the trouble, gentlemen?

THE COURT: Excuse me, has Mr. deBouthillier gone?

MR. MALOOF: He has gone to call his partner, Mr. Webber.

THE COURT: Will you please see that he does not get away until he helps our clerk find in that file the papers which he said were there, which he said he read.

Now you just get him, and we will take a brief recess in the meantime.

MR. MALOOF: He is on the phone making a call to Mr. Webber.

THE COURT: Well, we will take a recess. In the meantime counsel should gather around and watch, and hopefully you can find the papers and mark them as exhibits.

(Recess.)

(During the recess Defendant Weyerhaeuser Exhibits R to Z were received in evidence and Defendant Weyerhaeuser Exhibits AA and AB were received in evidence.)

MR. MALOOF: If it please the Court, the person we had called has left the office. We are unable to get him.

The plaintiff reoffers these two documents on the ground that, first of all, they have been agreed to be authentic from the files of London Salvage, and we offer them also as admissions against Weyerhaeuser, your Honor (handing to Court).

MR. WARNER: We object, your Honor.

THE COURT: That is Exhibits 76 and 77 for identification. I will read them.

(After examining) The purpose of these two documents, which is substantially the same, as I understand it, is to prove that the sewer line, the sanitary line served the master's and the radio operator's toilet.

MR. MALOOF: Yes, sir.

THE COURT: I feel I must sustain the objection.

As I said before, there have been very technical objections on both sides, which I am frank to say is surprising to me in a case of this sort, but lawyers have a right to try the case any way they want, and I have to rule on the objections.

These documents do not even say that anybody connected with the defendant said that.

MR. MALOOF: I think it says "owner" in it, your Honor.

THE COURT: It says: "There is one clapper valve

located on each side of the port and starboard at the after end of No. 3 hold from the master's and radio operator's toilets."

Where the unnamed author of this letter got that information does not appear. I suppose I could infer that perhaps he got it from somebody connected with the defendant, but I do not think it is clear enough.

MR. MALOOF: He was the owner's agent, your Honor, for insurance purposes. That is what Mr. Warner said in open court.

THE COURT: There isn't any evidence of who he is or anything about him.

I have got to sustain the objection on the offer as made.

MR. MALOOF: Yes, sir.

THE COURT: I regret that there is apparently some misunderstanding between counsel as a result of which you apparently let this witness go, who appeared earlier in the day. I do not want the case to end on a sour note of incrimination as to whose fault it is that the witness could not stay in the courtroom.

If you press the point, I will hear him briefly at 10 o'clock tomorrow morning, if you can get him here.

MR. MALOOF: No, sir, I won't press that point.

It is not that important a point in the case.

THE COURT: I don't think it is, either.

MR. MALOOF: It just fills in some gaps.

THE COURT: Are you sure there isn't somewhere embedded in all of these documents a statement about --

MR. MALOOF: I cannot swear what is in that body of papers, but I will let it go at that, your Honor.

THE COURT: Well, I am sorry about it.

MR. MALOOF: First of all, I think we have an open point with Mr. De Orchis -- the time that the freight was paid.

THE COURT: That is right.

MR. MALOOF: Can we get that by correspondence, your Honor?

MR. DE ORCHIS: I have an answer now.

New York Navigation Company states that invoice No. 2958, which has been marked as Plaintiffs' Exhibit 14 in evidence, was marked "Paid" on December 16, 1966, which was also the date that the bill of lading was issued, but that the money was received from Iligan on January 5, 1967; that this issuance of the bill of lading and the paid bill was done as an accommodation to Iligan.

THE COURT: Is that satisfactory to so stipulate?

MR. MALOOF: That the money was paid when, sir?

MR. DE ORCHIS: The money was received January 5, 1967.

MR. MALOOF: I move to strike everything except that remark. I think that is all Mr. DeOrchis was supposed to report on.

THE COURT: We might as well have the whole story. It was marked "Paid" at an earlier date but it was not paid, as I understand it, then.

MR. DE ORCHIS: The exhibit shows a "Paid" stamp, December 16, 1966, and this exhibit and the bill of lading were given to the shipper on that date so that he could go to the bank; but actually the shipper paid the freight on January 5, 1967, and the explanation is that this was done as an accommodation for Iligan so that they could process the documents before actually paying cash.

MR. MALOOF: I will accept that, that that is when the freight was paid, January 5th.

MR. DE ORCHIS: Iligan knows this better than we do.

Now I want a stipulation that this is what happened, that we gave you the bill of lading and the paid bill on December 16. If not, please call somebody from Iligan and I will call somebody from New York Navigation.

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MR. MALOOF: No, I am not calling anybody else, Mr. DeOrchis.

THE COURT: The invoice marked "Paid" is in evidence, is it not?

MR. DE ORCHIS: Yes, your Honor, and so is the bill of lading dated December 16 -- they are both in evidence.

THE COURT: I understand, but Mr. Maloof yesterday wanted further evidence as to when it was in fact paid, and that is what you are supplying.

MR. DE ORCHIS: January 5, 1967.

THE COURT: Can you bring yourself to accept that?

MR. MALOOF: Oh, yes, sir.

THE COURT: All right, I am going to consider that stipulated.

MR. DE ORCHIS: Now for the record, because I know what they are up to, I want to state that they are going to say -- and that is why I am making the statement -- they are going to say that because the contract with Iligan says that the bill of lading shall be issued after the freight is paid, they are going to claim, although they know otherwise, that the bill of lading was not issued until January 5th after the ship had sailed.

The witness who was here yesterday, who gave me this information, is perfectly willing to come to court and

statewhat Iligan knows, that they did Iligan a favor, they issued the bill of lading and the paid bill on December 16 before the ship sailed, but did not get paid until January 5th.

Am I right, Mr. Kennedy?

MR. MALOOF: I do not understand what Mr. DeOrchis is doing.

MR. DE ORCHIS: If it doesn't make any sense, then just let the record lie there as to what I said.

MR. MALOOF: Mr. DeOrchis had a chance to put his own client on the stand, and he was very upset when I put him on the stand.

MR. DE ORCHIS: I am asking you to stipulate simply that the bill of lading was issued December 16th.

MR. MALOOF: I won't stipulate that at all.

MR. DE ORCHIS: But his client knows when he got the bill of lading.

MR. MALOOF: This case has been tried. I think there was some testimony on that, your Honor.This is closing argument which --

MR. DE ORCHIS: I refuse to play games, your Honor. The record stands as it is.

THE COURT: I do not want any misunderstanding about this --

MR. MALOOF: There isn't any, Judge.

THE COURT: The bill of lading is in evidence. Is there any dispute as to when it was issued? It is dated December 16th.

MR. DE ORCHIS: That is correct, that is when it was issued.

MR. MALOOF: The problem is that the contract says that it will be issued after the freight is paid. That is why I was inquiring about that.

You see, Mr. DeOrchis -- now I will have a little chance to have a closing argument. He wants to argue that accepting the bill of lading is a waiver of the contract of July 11, 1966. I am not that upset by that argument of his, but I do not like to fall over dead even by the attempt to do it. Just because a shipper accepts a bill of lading doesn't mean he has waived the prior agreement, which says the bill of lading is a secondary document. I do not know why we are even discussing it at this stage. The contract with New York Navigation Company, the only contract of carriage was the freight agreement of July 11, 1966. This was the intention of the parties.

MR. DE ORCHIS: That still leaves up in the air a simple question of fact: when was the bill of lading issued.

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It seems to me our clients know -- my client says it was the date that is on the bill of lading, December 16.

If there is any dispute about that, if they deny that, they ought to bring somebody in. I brought him in, and I will bring back the man who issued the date on the bill of lading, December 16th.

MR. MALOOF: I put my client on the stand and I put New York Navigation on the stand. I don't know what more I can do. When I tried to inquire into New York Navigation's files, we fought for over an hour. This comes with ill grace, I think.

THE COURT: Well, I am not going to leave it up in the air. I thought we were trying to save everybody's time, because when this witness who was here questioned was asked the question he said he didn't have his file, he would have to look it up, and I thought we had agreed that he would look it up and that the answer would be furnished orally and that everybody would accept it.

MR. MALOOF: It was furnished, your Honor. The question was when was the freight paid. Mr. Dr Orchis has raised a completely different issue here today.

MR. DE ORCHIS: Mr. Grevers is available. I would be glad to bring him back 10 o'clock for any question that they want to put to him.

THE COURT: Well, let me just look over my notes. Wait a minute.

(Pause.)

MR. MALOOF: Judge, rather than have the trial go another day, I am going to try to get some sleep

tonight, rather than go further along this line. I think we have produced sufficiently through our client when the freight was paid because my client initialed a note on that bill that he approved the payment January 20th, or December 20th, which was after the ship sailed.

That is satisfactory to the plaintiffs. So I will drop that whole question, including the request of Mr. De Orchis to get any further information.

MR. DE ORCHIS: The important question isn't when the freight was paid but when the bill of lading was issued. Isn't that so?

MR. MALOOF: I haven't raised it.

MR. DE ORCHIS: Mr. Kennedy, I see your thinking behind it. Isn't that so, that the judge wants to know when the bill of lading was issued?

MR. KENNEDY: Mr. De Orchis, I don't know when the bill of lading was issued, I don't think the Court does. We have two witnesses from Iligan who were here. You could have asked them then. Your client was here. You could have asked him then.

MR. DE ORCHIS: My client could still be here any time your Honor says to give this information.

THE COURT: I am trying to see whether my notes indicate that anybody ever testified as to when the bill

of lading was issued. I do not find any mention in my notes that Mr. Grevers testified about it. Maybe he did. I don't write everything down.

If that is really an important question, the fair thing to do is to allow a little further testimony on that subject in view of the confusion that now exists. I don't find that he mentioned it. As I say, I don't purport to have full notes because I am going to read the stenographic record and I don't write everything down.

MR. MALOOF: I take it Mr. De Orchis agrees to bring New York Navigation in. I have no such request. But if he brings them in I do ask the entire file come with them so that we can be sure of what is in it.

THE COURT: I will allow Mr. De Orchis to call Mr. Grevers at 10 o'clock tomorrow morning. I don't want to open up this whole controversy again. As I understand it, he is to be examined with respect to the date when the bill of lading was issued and the date when the freight was paid.

MR. DE ORCHIS: That's all.

THE COURT: All right.

Now, apart from that, is everybody through?

MR. MALOOF: If it please the Court, plaintiff has two motions in connection with resting its case.

Plaintiff moves to conform the pleadings to the proof at this stage, specifically with regard to a demand for pro rata return of freight based on the sending of this ship to sea in a known unseaworthy condition. Under the law of the land they have no right to keep all of that fregight.

That is my first motion, your Honor.

MR. DE ORCHIS: In answer to that, your Honor already decided this motion when they offered to amend the complaint, made a motion to amend the complaint on this very point and your Honor denied the motion.

MR. HALOOF: If it please the Court, may my partner, Mr. Kennedy, be heard on that? Because he handled that part of the case and made that motion before your Honor to amend.

THE COURT: When was this motion made?

MR. DE ORCHIS: We have the record here.

MR. KENNEDY: Your Honor, the motion was made April or May of 1971, after the pretrial order was signed.

The reason the motion was made was that we included as an issue in the pretrial order a contention that we were entitled to a refund of freight if we could prove that the defendant's conduct was such so as to strip

them of the protection of the freight prepaid clause in the bill of lading.

As I am sure you know, there is a clause in most bills of lading which provides that the freight becomes earned once the cargo is delivered to the carrier, and the courts have said that negligence or failure to exercise due diligence will not vitiate this clause.

There are, however, other cases which say that certain improper conduct by the carrier will remove from the bill of lading or from the carrier the protection of this clause.

So we proposed it as an issue in the pretrial order. At that time Mr. Fish suggested that the proper way to do it would be to make a motion, since we did not have this issue covered in the standard complaint.

The motion was made initially before your Honor for permission to apply to the motion part to make a motion. You suggested that we submit a proposed complaint. I did that. The defendants contended that we were bringing a new issue into the case, and that is the issue of wilful conduct and/or gross negligence, something in that area, something more than what we were claiming initially.

The pretrial order, though, itself indicates

that we contend the defendants contracted to carry and accepted plaintiff's shipment on board the said vessel at a time when they had knowledge that the vessel was grossly unseaworthy, a condition which could not but cause serious loss and damage to plaintiff's cargo.

We contended then further that the defendants wilfully and with premeditation chose to continue the voyage at a time when the defendants knew that the vessel, which was at Panama undergoing repairs, was taking an unusual and large quantity of water into the No. 2 and 3 common holds, where plaintiff's cargo and the fertilizer cargo were stowed.

Now, these were issues in the pretrial order. They have certainly been issues in the case. It is obvious that they were issues in all the depositions. Yet the defendants contended in opposition to our motion to amend the complaint -- and, by the way, the pretrial order -- that we were bringing this new element into the case and that the entire pretrial would have to be started over again.

Your Honor accepted Defendants' contention and denied the motion.

THE COURT: Did this occur in Part I?

MR. KENNEDY: Yes, your Honor.

THE COURT: Were there any written papers on the motion?

MR. DE ORCHIS: Yes. I have the papers here, your Honor. I have the notice of motion by Messrs. Donovan & Donovan, and then I have a photostatic copy of your Honor's endorsed ruling on the motion. These are the two papers.

MR. KENNEDY: Where is the affidavit of Mr. Fish?

MR. CORSA: Maybe Mr. Kennedy would correct himself in saying the motion was made after the pretrial order as we read it was signed on November 10, 1971, and I see the motion was made in May. It is not one of the issues in the pretrial order.

MR. KENNEDY: I would make this correction, your Honor. I am sorry.

I believe what happened was a discussion came up at pretrial hearings and it was suggested at that time that a motion should be made rather than permission given to us to insert the issue in the pretrial order, but the issue of wilful was in the pretrial order.

MR. MALOOF: We wanted it in from the beginning.

MR. KENNEDY: I think after hearing the evidence, your Honor, I respectfully submit that the issue

has been in this case from the beginning. Certainly plaintiff knew about it and defendants knew about it. The defendants even discussed these contentions in their briefs.

THE COURT: I am frank to say I haven't the faintest recollection. When you sit in Part I you handle dozens and dozens of things in the course of a day and you do it usually by oral direction.

Now I am shown a piece of paper that says "Motion denied," with my name on it, and I assume it is the same motion you are talking about, and I haven't any recollection at all.

You said you made a motion for permission to make a motion, which is the rigmarole that usually one used to go through in Part I. Did I proceed to decide it right then and there?

MR. KENNEDY: Your Honor suggested I furnish a suggested amended complaint. I did so. Your Honor decided the motion suggesting that perhaps -- defendants contended that the wilful issue was not in the case, and you suggested that perhaps it might be better if we were to commence a new action and you denied the motion.

We are at this time respectfully renewing the

motion, since it is obvious that all parties to this controversy knew exactly what the issues were in the case at all times, and this is evident from what's taken place in this courtroom in the last few days, and it is evident from the questions and the answers given in the various depositions, and these depositions go back several years. This is no surprise to anyone.

The defendant Weyerhaeuser, in its brief at page 2, refers to one of plaintiff's contentions, and when they say they accepted plaintiff's shipment -- this is a plaintiff's contention now -- at a time when they acknowledged that the vessel was grossly unseaworthy and that they knew that the vessel, while undergoing engine repairs at the Panama Canal Zone en route, was taking an unusual quantity of water into the hold where plaintiff's cargo was stowed.

Mr. De Orchis at page 2 of his brief refers to the same contentions of plaintiffs, so I submit again that it's been no surprise to anyone and never was any surprise to anyone.

MR. DE ORCHIS: May I be heard just a second, your Honor?

THE COURT: Yes, I will give you plenty of time, but first let's see if we can't find the papers

on this. I have the court file out there. There usually isn't much of any record made on things that happen in Part I. Would you get me the file, please? It is sitting out there on the table. I will see if I can find any papers on this.

(Pause.)

THE COURT: I find in the court file a notice of motion, undated, but returnable on May 26, 1971, in Part I, for permission to make a motion for an order authorizing plaintiffs to amend their complaint.

This seems to be the original of the paper, copy of which Mr. De Orchis just handed me, so I will return his copy.

On the back of this document it says "Motion denied. So ordered, June 4, 1971." It has my name signed to it. I don't find any opposing affidavit.

Was there an opposing affidavit?

MR. KENNEDY: Yes, there was, your Honor.

THE COURT: It doesn't seem to be in the file, as far as I can see, and I haven't the faintest recollection of it, to be perfectly frank with you.

We will have to start fresh, I am afraid.

MR. KENNEDY: Plaintiff would at this time

then offer a motion to amend the complaint in the pretrial order so as to conform to the proof, which would include plaintiff's contention that it is entitled to a refund -- that it is entitled, in addition to recovering damages, to a refund of freight, since the freight could not have been deemed earned at any time.

MR. DE ORCHIS: May I be heard on this, your Honor?

THE COURT: Just a minute.

(Pause.)

THE COURT: Does anybody have the affidavit submitted in opposition to this? It doesn't seem to be in the court file.

MR. FISH: If your Honor please, this is a preliminary matter. I believe there were no affidavits on the motion to make a motion. It was anticipated there would be affidavits on the principal motion, but matters discussed before your Honor, as I recall it, my memory is not too clear on that point, it was disposed of without further documentation, except thatthere was a proposed amended complaint submitted.

THE COURT: But it wasn't filed, was it?

MR. FISH: I think it was not formally filed. I am not sure on that point even, your Honor. I

have no record that it was.

MR. KENNEDY: Your Honor, my recollection is that we filed -- we submitted or offered an amended complaint. I know it was not filed because your Honor denied the motion. I have checked our records, and in view of the trial we have been moving a lot of papers around and I haven't been able to find anything other than the notice of motion and the affidavit that I have referred to, but I would submit to your Honor that what took place at the prior hearing is not necessarily relevant.

I submit to your Honor that you could be in a position to decide the plaintiff's motion or application based upon what has taken place at the trial and based upon the evidence offered at the trial and based upon the contentions in the pretrial order, the pretrial memoranda, and also the arguments advanced in the respective briefs.

THE COURT: The only complaint in this action, as far as I am aware, is one in the original complaint filed March 23, 1967. It contained one count, as I already said this afternoon. It seeks damages in the amount of $3 million.

Now, if anybody thinks there is any other complaint it is high time we found out.

MR. KENNEDY: Your Honor, there is no other complaint.

THE COURT: There is no record of it in the docket. There is no copy of it in the file. All we have is this motion for leave to make a motion permitting an amended complaint, which apparently I denied. There is no record of what the argument was, what the issues were. There is no opposing affidavit. I don't remember.

Apparently Mr. Fish, who opposed it, doesn't remember. That leaves us in a highly uncertain state as far as the precedents on this matter go.

Now, Mr. De Orchis, it is your turn.

MR. DE ORCHIS: As your Honor has already pointed out, the complaint states just one cause in it. Subsequently, and this was not until they made their attempt to make a motion to amend the complaint, they wanted to amend it to add a cause of action for return of freight. That would have been an entirely new cause of action alleged in the complaint, and, in fact, on page 3 of his affidavit Mr. Kennedy says that it could be brought in this court as an independent cause of action.

We are not talking about a claim for damage to

cargo; we are talking about an entirely different claim, which is a claim for return of freight.

At the time that they tried to amend their complaint, the one-year statute of limitations had long since gone by, and they were time barred. And, furthermore, they should have brought that claim a long time ago, if they had one.

Subsequently, we agreed, all the parties in this case, to a pretrial order on which pretrial order this trial was to be conducted, and they stated what the issues were, they stated what their contentions were, and nowhere is there a mention of a cause of action for return of freight.

Now, the reason I am concerned is that this cause of action for return of freight might be aimed just at me, the charterer.

THE COURT: You are the one that got the freight.

MR. DE ORCHIS: Right. That is why I am opposing the motion. Actually, plaintiff, on the other hand, doesn't suffer anything by a denial of his motion, because in his claim for cargo damage directed at both of us is included the freight. He is entitled to a market value, which includes freight because of the

cargo insurance and so on. If he wins he is going to get his freight anyway as part of his damages, whereas if he is permitted now, at the end of the trial, to amend his complaint to a cause of action for return of freight he is shooting just at my client, and so I oppose this motion vigorously because, first of all, it is time barred five years ago; second of all, it was already denied previously; and, third, we don't make motions to conform to the evidence when you already entered into a pretrial order specifying what the counts are and he comes up with an entirely different count.

The first time I heard of it was in his brief, and when he mentioned it in his brief I replied and mentioned it in my brief. Other than that, it is in none of the pleadings, it was never in this case, it is time barred, it is res judicata already, and I oppose it.

MR. KENNEDY: May I reply, your Honor?

I am sorry to prolong this exchange. The reason the motion was made to amend was because when we had a pretrial conference, at which time all of the parties reviewed the pretrial memroanda, Mr. Fish -- I believe it was Mr. Fish -- indicated that plaintiff's pretfial memoranda contained an issue, the issue of refund of paid freight, and Mr. Fish contended, and

rightly so, and Mr. De Orchis contended today, and rightly so, the original complaint did not contain a cause of action for refund of freight.

Admittedly, most times the action for refund of freight is merged into the action for recovery of cargo damage, but not always. The position we took was that we were free to bring another action in the same court, in this court, but we felt there was no need for it because we already had an action pending arrising out of the same facts, the same issue.

I daresay if we had brought an action against the carrier the first month for the recovery of the cargo damage, and the following month for a refund of the freight, the carrier would have made a motion to consolidate and we couldn't have opposed such a motion. So the Court suggested at the pretrial conference we then apply to make an amendment. This was done and it was denied.

Mr. De Orchis contends that the time for suit had expired, and this suggests that possibly this is why the application to make the amendment was denied. There is nothing further from the truth. This was not an issue in the application. The time for suit in a cargo damage claim is one year, we admit that. To con-

tend that the time for suit in an action to recover freight, even though it arises as a result of cargo damage, is not governed by the one-year time for another. We are not seeking recovery of damaged cargo; we are seeking recovery of freight. It is a breach of contract action, and it is not covered by the time to sue. It is a frivolous argument.

THE COURT: What is it governed by?

MR. KENNEDY: In admiralty, absent a contract you do not have a fixed time for suit. Generally you look to the law of the forum. In this forum, which is New York, you find a six-year time for suit in con-ract. We could come down to this court tomorrow and begin an action.

I am sure the defendants would be very upset if we did that. What we are trying to do is save the Court some time. I am sure the Court is not interested in hearing all of this testimony again.

I might also add the special agreement, the agreement to which Mr. De Orchis' client was a signatory, provides that New York law is applicable to the controversy. If New York law is applicable we have a six-year time for suit as to an action to obtain a refund of freight.

All we are asking is that we be permitted at this time to formally amend either the complaint, the pleadings, the pretrial order, so that the Court would recognize or be cognizant of our contention that we are entitled to a refund of freight.

THE COURT: The argument is made that if I were to decide the facts which would fasten liability upon the defendants, that as a matter of damages you would be entitled to recover not only the amount of injury to the steel but also the freight?

MR. KENNEDY: That is correct, your Honor.

THE COURT: If that is correct why isn't it simply an issue of damages?

MR. KENNEDY: This is why I said that under some circumstances a claim to recover freight is merged into the cargo damage claim. However, if your Honor in this case decided that the package limitation would be applicable and the plaintiff's recover would be limited to whatever the package limitation allowes we would still have this item of freight which we say is recoverable not for the cargo damage, not because it was a cargo damage claim, but because of the damage of the carrier.

You cannot make a contract with a party to do something knowint when you begin to perform that you cannot

perform it. There is no consideration for this contract. And the consideration paid by the shipper should be returned to the shipper.

THE COURT: I was going to bring this up anyway, we might as well bring it up now, though we might have to continue this discussion tomorrow.

(Discussion off the record.)

THE COURT: Let's go on the record at this point.

As I said before, I do not remember why I denied this motion in Part I on some morning in June, 1971. Maybe some of these thoughts that I am now expressing went through my mind then, maybe they didn't. I don't remember what Mr. Fish said in opposition to the motion, and he doesn't have anything in writing as to what he said, and I don't really feel that I ought to be slavishly bound by the fact that I denied a motion made at that time to amend the plaintiff's complaint.

Viewing this as a new proposition, it seems to me that what the plaintiff is contending is that the defendants acted with such gross negligence that they should not be entitled to the benefit of the package limitation, and that by the same token the plaintiff should be entitled

to get his freight back, and I believe that it is my function at this time to decide as a question of fact whether the defendants did so act.

Now, if I decide that they did not so act, and that either they acted entirely properly or else there was just a little ordinary negligence and not this extremely gross type, then I would think it would follow that the package limitation would apply, and by the same token there wouldn't be any return of freight. But if I were to find in plaintiff's favor on the factual question, and find that the defendants did act in reckless disregard of consequences, then it would seem to me that whether or not a proper computation of damages would include the question of whether the freight should be allowed as a part of the damages.

Do you agree with that analysis?

MR. MALOOF: Yes, sir. Of course, we think we have proved more than gross negligence with actual knowledge of unseaworthiness and certain damage, but we do accept your Honor's comments and we withdraw our motion to add the action for freight at this time, and I appreciate the way your Honor analyzed that.

THE COURT: Very well. Then it is not necessary to amend the complaint. But if I ever get beyond

the determination in the first stage of this case, which I have mentioned, and either I or a magistrate have to go into the question of damages, then if my determination has been in favor of the plaintiff on the very gross negligence point I would expect the trier of the fact to consider whether or not as part of damages freight should be awarded. I think that is perhaps the best way to leave it.

MR. MALOOF: Thank you, sir.

THE COURT: That leaves the possibility open -- I think it is desirable to dispose of in this action every possible claim of the plaintiff. We certainly don't want to have the plaintiff start a new action and go through this all over again, and if everybody agrees that it be handled that way I think that is the best way to leave it.

Now, right on that point let me ask you. I have to decide now, as I mentioned, whether or not the defendants are entitled to benefit of the package limitation.

MR. MALOOF: Yes, sir.

THE COURT: Suppose I decide that they are. Do you consider that it is then up to me at this stage to determine how many packages there were, or is that a

matter of damages to be determined by the magistrate?

MR. MALOOF: I think possibly the magistrate could do that also, as well as come to the amount of damages in that respect. We do not stipulate they were all packages, so I think possibly the magistrate could be involved in that aspect of it.

THE COURT: In other words, the number of packages or number of freight units, whichever it is.

MR. MALOOF: Because there were reels and skids and a lot of other things.

THE COURT: Is that a question of damages or liability?

MR. MALOOF: I think your Honor at this stage must really determine the liability and the measure of damages. It will be either full damages or it will be limited to $500 per package, and then leave the determination of the number of packages for the magistrate, or $500 per customary freight unit; perhaps we have an argument like that in the brief. I think that is probably what this Court should do at this stage.

THE COURT: Do you agree with that?

MR. DE ORCHIS: No. I say that the question of what is a package is a question of law which has driven the Court of Appeals crazy the last couple of years,

and it is not a question to be sent to some commissioner. That is a preliminary question of law to be decided by the judge, and then, having decided whether these things are packages or not, the commissioner can apply the mathematics.

But whether something is a package or not is a question of law, it is an interpretation of the words used in the statute.

There was a case just the other day in which Judge Friendly said:

"I was afraid this wasn't the last case that was going to come before me about the packages."

It is not a question to be given to the commissioner. The bill of lading states on it 189 packages, and I think that that and Standard Electric gives the answer to whether these were packages or not.

THE COURT: I am going to have to consider then how I think it should be handled, and whether I think that should be left to the magistrate or not, since you don't agree on it.

It may be that there is not enough evidence in the present record to enable me to cope with that metaphysical question of what's a package. I don't recall much discussion of that in the testimony. If all we have

is the fact that the bill of lading says 109 packages, that isn't absolutely conclusive, is it?

MR. DE ORCHIS: We have that, plus we know who prepared the bill of lading, who called these things packages. It was the freight forwarder of the shipper, Iligan, and then we signed and agreed to it. I know that much.

THE COURT: I noticed, in looking over that list which was prepared by the freight forwarder yesterday -- I forget the exhibit number, but we had it yesterday -- we had an item which you could say was a package, if you like, but the item consisted of a number of boxes. Now, that is the classic case of what is a package, is it the thing on the outside or is it the little boxes on the inside.

I don't remember any testimony on that.

MR. MALOOF: There wasn't any testimony on it, your Honor. Of course it would be the defendants' burden to prove that.

THE COURT: I don't know what I will do on that. If I should decide that the measure of the defendants' liability is $500, if that is the figure, per package, and that I am not going to award or find facts which might entitle them to any more if I should reach

that conclusion, then I will have to use my own judgment as to who is going to make that ultimate decision on how many packages there are and whether or not further evidence is necessary on that.

MR. MALOOF: If your Honor does decide that it could be the matter of another hearing, I think, on that one point. I confidently expect your Honor will never reach that issue.

THE COURT: All right. Now, you started out this discussion by saying there were two things you wanted to bring up, and that is one of them. What is the other?

MR. MALOOF: The second one was my formal motion for judgment, your Honor, on the proof as it went in. I didn't know if I should do it now, because Mr. De Orchis still has to bring his client in tomorrow morning, but please consider I have made a motion for judgment on the proof I put in.

THE COURT: We will adjourn now until 10 tomorrow. We will hear Mr. Grevers on that point, which won't take long, and then you can make your motion for judgment.

It would be helpful if we had a very brief summation tomorrow, particularly, I think, as to what

you think you have proved with respect to the New York Navigation Company, but I would be interested in what you think youu have proved with respect to the shipowner, also. This doesn't have to be any extended discussion of the facts, but the vessel, after all, was owned by the Weyerhaeuser Company, and all that the Navigation Company did, as I get it, was to sign a charter party and take your money for freight.

Now, I don't know what the basis of their liability is on this theory of yours that everybody was so negligent as to be almost wilful, you see.

MR. MALOOF: We will go into that at length tomorrow, your Honor, and suffice it to say I think under the law New York Navigation absolutely and expressly warranted a seaworthy ship without any question of their having to exercise due diligence or anything like that.

THE COURT: But that might not amount to this intense liability you have mentioned.

MR. MALOOF: We will go also into the theory that since they had no ships of their own and relied on Weyerhaeuser as their agent, the knowledge of the agent is the knowledge of the principal, and that will support the deviation against New York Navigation, also. But we will be more prepared on those points tomorrow, your

Honor.

THE COURT: Do you want to write any more briefs? You have all written a lot of briefs.

MR. MALOOF: Yes, sir, we do. I don't think you need any more law, but I think we might assist the law in tying some of the facts together. I would like to.

THE COURT: As I told you, I think, I am leaving here shortly on vacation, and I have a great many things to do, and I will not be able to get to this case until September. So as far as I am concerned, you can happily spend August writing briefs, if you want to, provided I get them all by Labor Day.

MR. MALOOF: Thank you, sir.

THE COURT: All right. Ten o'clock tomorrow.

(Adjourned to July 20, 1972, at 10:00 a.m.)

mkpl

ILIGAN INTERNATIONAL CORP. and
ILIGAN INTEGRATED STEEL MILLS, INC.
vs.
SS JOHN WEYERHAEUSER, her engines, &c., WEYERHAEUSER COMPANY and NEW YORK NAVIGATION COMPANY, INC.

57 Civ. [illegible]

New York, July 20, 1960;
10.00 A.M.

Trial resumed.

THE COURT: I would like to keep the original depositions. I assume you have copies of them which you use.

I have Dumble's and Mandle's, but I do not have the other one.

MR. MALOOF: Mr. Baumgartner.

THE COURT: May I have the Baumgartner original which I think was marked for identification?

MR. MALOOF: I think probably all the depositions are marked in evidence, aren't they, your Honor?

THE COURT: I think you are right. I think they want into evidence finally.

All right.

MR. DI ORCHIS: Mr. Grevers

A U G U S T G R E V E R S, recalled, having been previously sworn, testified further as follows:

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DIRECT EXAMINATION CONTINUED

BY MR. DE ORCHIS:

Q Mr. Grevers, I show you Plaintiffs' Exhibit 8 in evidence, and I ask you can you identify that document (handing)?

A Yes, this is the second original bill of lading.

Q Is that the bill of lading that covered the shipment in suit?

A Yes, it is.

Q Now I show you Plaintiffs' Exhibit 14 in evidence and ask you if you can identify that document (handing)?

A Yes, this is the freight invoice covering the cargo named in the bill of lading.

Q Would you tell us when was the bill of lading issued?

A The bill of lading was issued on December 16, 1966.

Q And when was the freight bill marked "Paid"?

A The freight bill was marked "Paid' December 16.

MR. MALOOF: The document speaks for itself, your Honor. We do not need the witness for that.

THE COURT: I will allow it.

Q And when was the freight actually received by New York Navigation?

A On January 5, 1967.

Q Can you tell us -- can you explain why the invoice is marked "Paid" on December 16 but the freight was received on January 5th?

A Yes. We were required to supply to the shipper, amongst other documents, a receipted freight invoice at the time of our billing the freight and releasing the bill of lading. This was an accommodation to them to enable them to process documentation and receive funds for the payment of the freight.

Q Is this an unusual procedure in the shipping business?

A No.

MR. DE ORCHIS: Your witness.

CROSS EXAMINATION CONTINUED

BY MR. MALOOF:

Q Mr. Grevers, when you were asked a question as to when the bill of lading was issued, I noticed that you looked at the bill of lading to see what the date was there?

A Yes.

Q And then you repeated that date, isn't that right?

A That is correct.

Q In other words, you assumed that that was the date that the bill of lading was issued, is that right?

A That is correct, yes.

Q The freight bill, which is Plaintiffs' Exhibit 14, has "Paid" on it December 16th, but that is not accurate, is it?

A No, that was --

Q Just yes or no, please.

A No, that is not correct.

Q Did you deliver the bill of lading to Iligan personally?

A No, sir, I did not.

Q Do you know when it was? Do you personally know?

A I do not know.

MR. MALOOF: No further questions.

THE COURT: Anything else?

REDIRECT EXAMINATION

BY MR. DE ORCHIS:

Q When did the ship sail?

A December -- I believe December --

MR. MALOOF: Objection. I believe we are going beyond the reasons for this examination this morning.

MR. DE ORCHIS: I am on the subject of the issuance of the bill of lading.

THE COURT: I will allow it.

Q When did the ship sail?

A December 16th.

Q And you testified the date on the bill of lading is the 16th?

A Yes, I did.

Q Was there any custom in your company at the time as to when bills of lading are issued in relation to the date on the bill of lading?

MR. MALOOF: I object to company custom, your Honor. There is no such thing.

MR. DE ORCHIS: If they had a practice or a custom to do a certain thing at the time I think is proper.

MR. MALOOF: I object to that as irrelevant.

THE COURT: I will allow it.

(Question read by the reporter.)

A Yes, our custom, and I believe it is a custom throughout the industry, not just in our company --

MR. MALOOF: Objection. He has not been qualified.

THE COURT: Overruled.

A -- to release bills of lading at the time that they are stamped and signed.

MR. DE ORCHIS: Thank you. No further questions.

THE COURT: Anything else?

RECROSS EXAMINATION

BY MR. MALOOF:

Q Mr. Grevers, do you know when this bill of lading was signed personally?

A I do not know personally.

MR. MALOOF: No further questions -- oh, one more question.

Q Did you bring your file with you this morning?

A Yes, I did.

MR. MALOOF: No further questions.

THE COURT: You are excused.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: Everybody rests?

MR. MALOOF: Yes.

MR. DE ORCHIS: New York Navigation Company rests.

MR. WARNER: Weyerhaeuser rests.

MR. MALOOF: Plaintiff rests.

At this time, your Honor, plaintiff moves for a judgment against the defendants jointly and severally for the full amount of this loss as shall be subsequently determined by this Court, with interest at the official rate from December 16, 1966, and costs and disbursements of this action.

THE COURT: Decision reserved.

I will have a brief summation now.

I will hear first from Mr. Warner.

MR. DE ORCHIS: May I make a motion for the record, your Honor?

THE COURT: Yes.

MR. DE ORCHIS: The defendant New York Navigation Company moves for dismissal of the complaint in this case and, in the alternative, moves for indemnity against Weyerhaeuser, including attorneys' fees.

THE COURT: Decision reserved.

MR. WARNER: May it please the Court, the defendant Weyerhaeuser renews its application pursuant to Rule 41 which was made at the close of the plaintiff's case for dismissal of the cause of action against the defendants.

THE COURT: Decision reserved.

MR. WARNER: May it please the Court, I will be brief, and I will deal first with the contention of the plaintiff that Weyerhaeuser was guilty of wilful, gross, wanton, reckless conduct, such as to vitiate the Carriage of Goods By Sea Act and to make Weyerhaeuser an insurer.

I say that there is no reliable, probative evidence in the record to sustain such finding.

There were some experts here, paid experts, who not only testified in behalf of the plaintiff but they absolutely overkilled the situation. They were so biased and prejudiced that it shocked the conscience. So I shan't deal with that first issue any more.

The second one is that there is no evidence in this record that either the port or the starboard clapper valve in No. 3 lower hold leaked prior to departure of the vessel from Tampa. There are guesses, conjecture, but there is no evidence.

I direct the Court's attention to the fact that the vessel was surveyed, examined by experts, in Portland, Oregon, by the American Bureau of Shipping and the Coast Guard, and proceeded to the East Coast of the United States, and again at Baltimore was surveyed by experts.

Again yesterday we heard from an eyewitness who

went down into the vessel and saw absolutely no sign of leakage, and all the witnesses ttestified if there had been leakage there would have been evidence of it, not only smell evidence but eye evidence, staining of the bulkheads, and there was nothing there, no one saw anything like that.

There is some evidence that in this compartment, here, the rose box, the bilge well, with a 60 or 100-gallon capacity, from this huge area drawining back, that the master was pointing out or ordering under his direction that the engineers were pumping out the bilge.

We had testimony yesterday, it is in the logbook, there was snowing in Baltimore, melting of the snow, loading of cargo in the Northwest, the result of sweat when you go from north to the tropical climate and back north again, the condensation in the cargo compartments.

There was a washing down of the vessel on its trans-Pacific voyage, fresh water pumped into the hatches in order to clean them out. There are entries in the logbook to that effect.

The next point is, I submit to the Court that Weyerhaeuser did exercise due diligence to make the vessel seaworthy prior to the inception of the voyage.

That is all it was required to do. The vessel was kept in class, the vessel had been inspected by the Coast Guard, the vessel again was surveyed as I alluded to just a moment ago. The ship's officers were there. The vessel was chedked out. The witness yesterday said that she was dry and clean. He wanted her swept up a little bit more, but he was quite satisfied with No. 2, there was nothing wrong with it, and he was a pro, he sailed as a master for seven or eight years.

I submit the ship was seaworthy, due diligence had been exercised. If anything went wrong after the vessel left Tampa, our brief supports that that was an error in management for which Weyerhaeuser is excused pursuant to the Carriage of Goods By Sea Act.

If the Court does not find that we exercised due diligence we submit the limit of our liability pursuant to the Carriage of Goods By Sea Act is $500 per package, the package limitation of COGSA.

I also submit that if the Court goes beyond that we also rely upon the limitation of liability to the value of the vessel plus its pending freight.

THE COURT: Is there any evidence of that?

MR. WARNER: Not in the record, but it can be readily produced. It was sold not long after the

event, so we have a market value.

THE COURT: What is your position on that? Do you say that the vessel owner is always entitled to limit its liability to the value of the vessel?

MR. WARNER: Unless they can show that the fault was with the privity and knowledge of the owner. If it were the master's fault, yes. But if they can bring it back to the owner, no, we cannot limit our liability. That is what the law is on the subject.

THE COURT: How does this differ from the package limitation?

MR. WARNER: There is not much of a difference, your Honor. We are keeping this in here out of an abundance of caution. I don't want to breach our duty to our clients. I admit there isn't much of a difference between this and the package limitation.

THE COURT: There would be a difference in the amount?

MR. WARNER: Yes. The package limitation comes first, and if we fall on that we want to fall back on value.

THE COURT. The package limitation would be $500 times 189 packages under your contention?

MR. WARNER: Yes.

THE COURT: And the vessel's value was more than that, I suppose.

MR. WARNER: Yes, your Honor.

Counsel for the plaintiff have urged that there was a deviation from the contract. The cases that are cited -- we didn't put this cargo on deck, we put it down in the hold where it was supposed to go, we carried out the voyage the way we were supposed to carry it out, we went directly to the destination as agreed, so there was no deviation in a geographic or loading sense because all of it was done properly, and there is no evidence to rebut that.

There is one further issue in this case, and that is the issue between Mr. De Orchis' client and my client. He has counterclaimed or cross claimed against us, and we have not cross claimed against him. He is asking for indemnity, and he is asking for attorneys' fees.

The attorneys' fees are of recent origin in this type of case. The first case was Skautroll, in which Judge Weinfeld ordered counsel fees to my learned opponent's firm, and the second was the Farley case, in which the Court of Appeals affirmed Judge Ronsal in awarding attorneys' fees.

I submit the facts in this case are different than in those cases. All that was involved in Parley was a time charter. Our firm represented the charterer and as charterer were stuck for legal fees, but the only contract was the time charter, there was not the Exhibit 4 that we have in this case, this special agreement between New York Shipping and Iligan.

All along we have been perfectly willing to defend this case, but not to assume New York Ship's independent liability, whatever that may be.

It is being urged, and I anticipate it will be urged by Mr. Maloof here -- it is intimated in his brief -- but I think he is going to say, at least he has intimated that -- that the bundle of rights that Iligan got from New York Ship is greater than he has against us, and I submit that the bundle of rights that he may have from New York Ship is greater than the bundle of rights that New York Ship got from us. They got a time charter which incorporates going and coming. It is very carefully written.

So in those circumstances I suggest that the Court deny any claim for attorneys' fees.

Before I finish, there are 13 points in Mr.

Maloof's brief. I think I have hit the highlights. I certainly will not discuss the Warsaw Convention, I don't think it has any application. I am not going to go into this return of freight, we are not a party to that.

MR. MALOOF: That has been withdrawn, your Honor.

MR. WARNER: Finally, just one last point, and then I will sit down.

At the outset of this case, back in '67, Mr. Fish offered to pay the package limitation right there and then. This case came on before you in pretrial in April of 1970, and at that time we offered to pay the package limitation with accrued interest to that date.

There was a letter written by Mr. Kennedy to you -- we got a copy of it -- which said:

"We must report to your Honor our clients instructed us to reject the offer of settlement, and therefore it seems this matter shall proceed to trial."

Again we came before this Court two months ago, I think it was May 12th. On the steps of the courthouse, on the way out, I said to Mr. Maloof, "I will give you the package limitation and the interest to date. Let's wrap it up."

Again at the opening of the trial I offered him the package limitation and the interest to date. It's been rejected.

I mention this because, as the Court knows, in admiralty you have the complete discretion in awarding of interest if you decide we should pay the package limitation.

The real plaintiffs here are not Iligan. We are not dealing with some unsophisticated plaintiff that doesn't know what's going on. Continental is one of the biggest. I have worked for them. We have all worked for them. Firemans Fund is one of the biggest. They are pros in the business of marine insurance. Frequently we as counsel write letters to them and they correct and edit our letters and send them back to us. They know more about admiralty than we do.

They took a flier here. They wanted their trial. They have tied up this courtroom; they have put us to great expense. We have been willing to face the utmost of our obligations pursuant to what we consider to be the applicable law. We say that they should be denied interest.

It is in the record that Libertys were in a dicey stage at that time, they were 22 years of age.

They wanted additional premium for putting cargoes into these ships. They knew what they were getting. They were wide awake, pros. They knew jolly well if something happened to the ship's cargo all they could get was 500 per package. So now they are whining and crying. They accepted their premiums and got hurt a little bit. That is the whole business of writing insurance, to pay claims.

Incidentally, I may point out to you, I remember Patterson when I was taking insurance at Columbia. He wrote the book "Essentials of Insurance," and he told us in class and in the book subrogation is nothing but a windfall to the insurers.

Judge Friendly in Farley said we"should not shed crocodile tears over the cargo underwriters," and he is quite correct.

I submit we exercised due diligence, they should get nothing. If anything, they get the package limitation, and they should not get any interest.

THE COURT: Mr. De Orchis.

MR. DE ORCHIS: I will also be brief, your Honor. It seems to me, looking at the whole case here, the plaintiff's attorneys really haven't proved anything more or less than we see proven in most cargo cases.

They have made out a prima facie case that the cargo was delivered in good condition because the bill of lading is clean, and then they have evidence that the cargo was damaged at destination. But other than that their whole case is just a house of cards.

It all started when Mr. Donovan went flying off to the Pacific with two surveyors on each side of him, and ethe whole case in liability has been tried by surveyors and experts hired by the plaintiff's attorneys. Not a single witness from Integrated Steel has come into this courtroom to identify himself with this litigation.

MR. MALOOF: I object to that. Mr. Pereyra was on the stand. He is their authorized representative in the United States.

I don't like to interfere in closing remarks, but it can go too far.

THE COURT: That is true. We had Mr. Pereyra.

MR. DE ORCHIS: Yesterday your Honor observed with some shock, and I would agree with it, that Weyerhaeuser had not called a single live witness. But in fact Weyerhaeuser did by deposition take three major witnesses, as I believe it had the right to do, and then offer the depositions at the trial. But nobody

from the plaintiff in this case, Integrated Steel, not International, Integrated, not one witness ever came into this courtroom.

On this last point of this exercise this morhing with this bill of lading, had they really had any serious issue about when the bill of lading was issued or when the freight was paid, all they had to do was to call their people in here, but they asked me to bring back my man, and in the art of cross examination they are going to prove that it wasn't issued on the 16th. That is the way the whole case has been approached. It's been a lawyers' exercise in seeing whether they could come up with a big fee, and that is the way I look at this case.

MR. MALOOF: I object to that strenuously. It is a personal attack and uncalled for.

THE COURT: It is argument.

MR. MALOOF: All right. It is meaningless anyway.

MR. DE ORCHIS: What have they proven? They have proven there was water mixed with fertilizer when the ship arrived at Moji, Japan, and nobody disputes that.

Other than that, all they have proven is that

this 22-year-old ship occasionally had water in the bilges, that they did a lot of pumping of bilges.

Oddly enough, if we hadn't pumped bilges, that is, if the ship had not pumped bilges, we would have been criticized for that. But because this engineer who was no longer employed at the time of the trial and so was not available -- because this engineer liked to pump every day he is criticized for pumping every day.

But about Madras there is a very interesting thing. They made a big thing that it all started in Madras with this previous cargo of fertilizer which arrived at Madras and there was water in the hold and there was this and there was that, and yet we all know, because we all did our homework, the three sets of counsel here, and we know because they have set it forth in their brief, that there is pending in this very courthouse a suit about the cargo that was delivered in Madras, the fertilizer which has all been talked about here, and that suit is in record here, and the interrogatories are there, the answers to the interrogatories are there, the depositions are all in the file, we have all looked at them, and it is a suit for shortage.

MR. MALOOF: May I object to that. It is not in the record.

THE COURT: It is the first I heard of it.

MR. MALOOF: I don't like to interrupt this way, but I don't want to waste my time either, your Honor, and I haven't read the record of that case.

MR. DE ORCHIS: May I continue with my argument.

MR. MALOOF: Please stick with the record, Mr. De Orchis.

MR. DE ORCHIS: Now, water in the bilges that accumulated occasionally, they would like to have the Court believe it came from the pipes 18 or 22 feet above the bilges and through a hole maybe three-quarters of an inch in diameter, maybe four inches long.

But in fact everytime we looked closely at the water in the bilges there is some other possible explanation for it -- such as heavy snow in one port, such as rain in another port, such as the listing of the ship; and the burden, if they want to show a grossly unseaworthy ship where we have several possible explanations, and they are put on the scales, the burden is on the plaintiff, on his side of the scale to show, no, it wasn't that, but a leaking pipe.

Not a single witness has come into this court to say that he saw that pipe leaking, and yet here is a ship in active trade, with longshoremen going aboard by the hundreds at different ports, with officers serving on the ship, surveyors scurrying in and out of the ship and never, never has a witness been found whoever saw this pipe leaking until it was uncovered from where it was buried in the fertilizer at Moji, and until that point there is absolutely no evidence, and circumstantially it doesn't even stand up because if that hole had been in that pipe and these 18 inches of water, with hundreds of gallons of sewage accumulating there, I do not think we even need any witness to demonstrate that -- this would have been noticed easily by anybody going on that ship. You wouldn't even have to go down in the hold -- just open the hatch cover and you

would smell it.

THE COURT: The evidence is that at Moji this valve was observed to have a crack in it of certain dimensions -- I forget what it was -- 2 inches by something. Now there seems to be no doubt about that. Is it your theory that that happened after the ship left Tampa?

MR. DE ORCHIS: Yes.

THE COURT: It suddenly opened up a crack?

MR. DE ORCHIS: The pictures we have or the valve show that the welding is at the bottom of the crack, at the bottom of the valve, so that any water in that valve would have strained down into the hold, and I say if this had been so at Baltimore, if this had been so at Tampa, with all these people going in and out of the hold while others were living on the ship their daily lives, that you could not have gone down in that hold -- the surveyors looking around, experts at this business, and not one of those surveyors would have noted that there is water coming out of that pipe.

THE COURT: It wouldn't have been coming out if the ship was light enough so that the exit end of the pipe was abovewater.

MR. DE ORCHIS: No, that is not correct. It would not have been coming from the sea when the exit

pipe is above the water, but the toilets upstairs, the wash basin -- everytime they would use it water would be flushing down through the sanitation line.

THE COURT: But most of it would keep going right on out, wouldn't it?

MR. DE ORCHIS: No, it accumulates in the bilge. It falls out of the pipe, the lines in the hold, on the floor of the hold, and then accumulates in this bilge.

THE COURT: Suppose there was a small crack in this pipe at Baltimore and at Tampa, and nobody noticed it; it seems to me reasonable to believe that whenever somebody flushed the toilet most of the water would go right on out through the pipe outdoors, and just a very small amount might drop down through this small crack.

MR. DE ORCHIS: All right, I will agree with your Honor, if there was a small crack mostof the water would go overboard, but if the crack was that small then we do not have a ship that is grossly unseaworthy.

THE COURT: Except that the crack got a lot worse before it got to the end of the voyage.

MR. DE ORCHIS: What can the shipowner do about that? He can exercise due diligence at the beginning and before the voyage. Once the ship sailed the due diligence duty is over with. It is not a continuing

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duty under the Carriage Of Goods By Sea Act. This 698 specifically says the exercise of due diligence is before and at the beginning of the voyage, so we are talking about one place that we are interested in only as to this, and that is Baltimore.

THE COURT: But what I am suggesting to you is that there was a lack of due diligence at the beginning of the voyage because there was in existence a crack which got worse until it became of disastrous proportions.

MR. DE ORCHIS: If we have that, and your Honor could find that, then you would find the ordinary cargo case. You simply do not break the limitations on that set of facts. But the reason that even the small crack leaves a great doubt, at least in my mind, is that they say there was 18 inches of water in the bilge accumulating at Baltimore, when we know the clapper valve was above the waterline, and this 18 inches of water they have been saying has been coming from this valve, and to get 18 inches of water, 160 or 175 gallons, that is not a small crack.

Furthermore, there would be streaks, as the surveyor said, if there had been even a dripping -- there would have been streaking on the bilge with rust.

THE COURT: Let us suppose some of the water came from snow, and some of the water came from lumber and

a little of it came from the crack when somebody flushed a toilet -- it does not all have to come from one source, does it?

MR. DE ORCHIS: No, but we are interested in here the legal liability of the ship only. Before the Carriage Of Goods By Sea Act there was a warranty implied. If the thing leaked this would have been a liability case, and that is it. The Carriage Of Goods By Sea Act and the Harter Act limited, reduced the shipowner's responsibility to the point where he must exercise due diligence to make the ship seaworthy. In this case it has to be seaworthy as to his valve because proximate cause must be shown. So looking at this valve and where it was located, and the history of the ship, the master said he was concerned about this, and he inquired of the engineer. He went down himself. He said he spoke to the marine superintendent, so we do not have a man who is sleeping up in his cabin. All through his testimony he is saying what he did, to try to find the source of this leak, and he thought maybe everytime they loaded freshwater they got some kind of a leak, but he never did find the source of the leak.

Now not having found the source of the leak, one witness said he wouldn't have sailed the ship, but we know from the logbooks that the pumping of these bilges by

the pumps that were on the ship always kept it under control until this voyage. They did get water in other holds, not only in this hold. They got water in this bilge, but everytime you have 18 inches, the next day you have zero, and it goes up and then you have zero. And this is what pumps and bilges are all about. The bilges collect the water; the pump pumps it out.

So we do not have a shipowner sending out what they say is a grossly unseaworthy ship, nor do we have an owner who is so senseless to the duties that he has that he would let his ship go out knowing that he has a dangerous situation. Nobody thought there was a dangerous situation when the ship sailed from Baltimore, because whatever leaking they had was not that serious, and it was controllable by the pump.

Now as to the claimover, Mr. Warner said that there is a difference in the contracts between New York Navigation and the plaintiff and the contracts between New York Navigation and Weyerhaeuser. Now that is not so. The reason for that is that if you look at the time charter between Weyerhaeuser and New York Navigation Company, that is the standard form of New York Produce Exchange time charter. That time charter not only warrants -- warrants the seaworthiness of the ship at the beginning of the

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voyage, but that time charter specifically warrants a continuing seaworthiness throughout the voyage. It is surely different because I am the one that has the bigger protection -- not theplaintiffs here. And that was just decided recently in Dempsey v. Sea Star, Slip Opinion 339 at page 3086, Second Circuit, interpreting this very form of time charter, exactly the same form.

We even went up to check the record to make sure, and they say the shipowner owes an absolute and express warranty to the charterer.

So that even if you were to find that I warranteed the ship to the plaintiff, I am all right -- they warranteed their ship to me. But there is a question about whether we warranteed the ship to theplaintiff because while originally this agreement that was signed had in it language which could be construed as a warranty, the events that happened afterward indicate that there was a change in that. The bill of lading, when it was issued,was supposed to have stamped "Subject to this agreement." In fact, it was not, and we know from the evidence that when they looked at this bill of lading, which had been prepared by the plaintiffs' agent, forwarding agent, there was an argument about the weight and the freight and it had to be gone over again, and in all of this talk back and forth about the final bill of

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lading, no one ever questioned the fact that this stamp was not put on there, and in fact in the five years since this happened never has Integrated or anyone else other than the plaintiffs' attorney ever written a letter or made a statement to New York Havigation Company --

MR. MALOOF: Again we are outside the record, your Honor. I do not want to make all these notes for no reason.

MR. DE ORCHIS: It is on the record from Mr. Grevers' testimony that there had never been any complaints about the lack of this stamp.

MR. MALOOF: I don't recall that, I don't remember that.

MR. DE ORCHIS: Now the particular form of the bill of lading that was used here was attached to the agreement. The parties wanted no question about what bill of lading they wanted attached, and while we had some confusion about these different bills of lading that are in evidence, the clauses that we are interested in, as far as the terms of the bill of lading, those are all the same, those are printed. And the clauses of the bill of lading, if we look at them on its face, as we must do, at least the original, it is quite clear that the original bill of lading, clause 26 says that "All previous agreements

are superseded by this bill of lading."

Now that is a standard form. We did not invent that. You will find in every Admiralty book that this is a government form bill of lading.

Secondly, this bill of lading says that New York Navigation Company signs this bill of lading only as an agent for the master.

Again this is a standard government form, and in the back of clause 1(a) it states that this contract shall be with the shipowner as the carrier. However, then it says -- this is the standard 1(a) clause I have reference to, as the Himalaya clause. However, if anybody else should be found liable as carrier or as bailee, then he shall have all the available defenses.

So our position is, on the face of the bill of lading, that our arrangement was that when the bill of lading would be issued the contract as carrier would be with the shipowner, not with us, possibly because we wanted to avoid exactly this kind of a suit. But, at any rate, if your Honor should find that our relationship to the plaintiff was as carrier, then under the terms of the bill of lading, if we are the carrier, we have the various defenses, and of course the $500 limitation is in there specifically, the Carriage Of Goods By Sea Act is in there specifically,

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and we would have exactly the same position vis-a-vis the 704
plaintiff as does Weyerhaeuser.

Finally, I want to point out this being an Admiralty Court, and equity is what an Admiralty Court aims for, that New York Navigation Company really did absolutely nothing in this case as blameworthy. We were not on the ship. It was their ship, Weyerhaeuser's.

The testimony has been that the shipowner prepares the ship, maintains it, has a crew on it. We had nobody on the ship. All we did was some paper work and some business. We collected some freight which hopefully was a little more than we paid Weyerhaeuser under the charter party. But we are paper people. We don't own ships. Weyerhaeuser had a duty here not only under the charter party with us but under implied law and also under the bill of lading -- and they had the sole duty to maintain the ship, to exercise due diligence, to make it seaworthy, and to do all the other things necessary to assure that the cargo would be safely delivered. It was not our duty. We did nothing.

We have been involved in a lawsuit here where everybody knows from the evidence -- at least we know it now -- that we did not do anything. We did not cause this hole. We knew nothing about it. Not a single witness has testified that we knew about this hole until we heard from

Japan -- although they have alleged in their complaint that we wilfully and with premeditation sent the ship to sea.

THE COURT: Presumably you are in business to make money, and you charged for freight, as you say, you hoped and trust that you collect more freight than you pay charter hire, but are you saying that you can do this without any responsibility to the people whose goods you carry, that you can say, "It is the owner's fault and not mine"?

MR. DE ORCHIS: Our responsibility to them under the terms of the contract was to go find a ship that could carry their cargo at the rate that we agreed in that contract. At the time we agreed we were taking the risk that when the time came to get these ships the market might go up or the market might go down. We first signed a contract with them and agreed to certain rates. Subsequently we went out and signed a time charter with Weyerhaeuser. The market changes daily. So when I said that hopefully we made money, it isn't a terrible thing for a charterer of this type to say, "Okay, I will guarantee to you that your cargo will be carried for X amount, and I will go out and get a ship, but once I get a ship and it is a satisfactory ship, then the carrier under the Carriage Of Goods and the Harter Act and all the others, the carrier will be the shipowner and I will act as his agent for the purpose of bringing out a

bill of lading and I will hire the stevedores, but I am not the carrier," -- at least this is what the bill of lading says.

Now I agree that there is a gray area here, and your Honor could find, because we collected freight, that we were therefore carriers as to these people. If so, then the bill of lading binds us but we also get all the defenses under the bill of lading.

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THE COURT: And the contract binds you, doesn't it?

MR. DE ORCHIS: The contract, the agreement if we look at the documents themselves the agreement is superseded by the bill of lading and actually doesn't make that much difference.

THE COURT: Because somebody forgot to put the stamp on.

MR. DE ORCHIS: The only difference between the bill of lading and the contract is that in the contract we warrant, if you want to read the language that way, and in the bill of lading we exercise due diligence. But in this case that is academic because he is saying far beyond the simple breach of warranty, far beyond negligence, due diligence, he is saying gross negligence. If we did that, then the other things are academic.

THE COURT: Suppose you did. Then does it make a difference whether it is warranty or due diligence?

MR. DE ORCHIS: If we breached the warranty he would have his prima facie case. If we did not exercise due diligence he would have his prima facie case. The same way.

In other words, the simplest thing to do is to breach a warranty.

THE COURT: If you warrant that the ship is seaworthy and it isn't, you are stuck regardless of whether you are diligent or not, aren't you?

MR. DE ORCHIS: That's right.

THE COURT: Isn't that the difference?

MR. DE ORCHIS: Except that in this case he is not charging simple breach of warranty, he is charging more than that.

MR. MALOOF: I take issue.

MR. DE ORCHIS: If I only breached a warranty, then there is no question the limitation must apply. That is the smallest of the sins of breach of warranty.

Negligence is the next step. Gross negligence is wilful -- is even another step, and that may break the limitation. But if we are at the level of a simple breach of warranty there is no question the package limitation must apply. Due diligence, the question of the limitation shall apply by the Carriage of Goods By Sea Act. Gross negligence, now we are in this never-never land that they are trying to use this case to establish some new law.

THE COURT: Let me ask you once more on that. I will have a chance, of course, to study this later, but what you have just said surprises me. Suppose you

warrant that this is a sound ship, a seaworthy vessel, that there is nothing wrong with it. Are you saying that if it turns out that it was unseaworthy and there were things wrong with it and the cargo was ruined, that you can still gake the package limitation?

MR. DE ORCHIS: Yes.

THE COURT: What law is it that says that?

MR. DE ORCHIS: Because the bill of lading has in it an agreement between the parties to limit the package -- to limit recovery to $500 a package.

THE COURT: Is there any such agreement in the contract between you and the plaintiff?

MR. DE ORCHIS: The contract between me and the plaintiff is not just the agreement, the contract between me and the plaintiff is the agreement, step one, and then it says, "All other terms shall be found in the bill of lading," step two. Then it says, "If anything in the bill of lading is contrary to what is in the contract, the contract shall survive." If the clause is placed on the bill of lading.

At any rate, there is nothing contrary between a warranty that you will furnish a seaworthy ship that will either give rise to liability or not and a limitation of liability. We are not talking about deviation.

If we are talking about deviation that will take away your contract rights. We are talking about the simplest, most innocent breach of a breach of warranty, because you can do it without even meaning to or without having any knowledge.

What he is saying here is that we should not have the package limitation, not just because we breached the warranty, that is nothing, not just because we didn't exercise due diligence, he says that is nothing; he says you wilfully, grossly, and so on. And that will break -- that may amount to a deviation.

So the package limitation applies to due diligence by the law of the land, it should certainly apply to simple breach of warranty. I don't know if I make myself clear.

THE COURT: You do. Is there any authority?

MR. DE ORCHIS: That a package limitation applies to a simple breach of warranty?

THE COURT: Yes.

MR. DE ORCHIS: I am sure there is. We will brief it in our final brief. I think it is already in the cases we have. It never even crossed my mind that there would be a question about that, but I will make it a point when I file the brief to discuss this and to

get the citations for it.

THE COURT: All right.

MR. DE ORCHIS: Finally, one word on the shortage claim.

I was trying at the beginning of the case, and have been all along, to get out of this case by throwing in some money for this alleged shortage.

They put some evidence in the case, but they have never proven a prima facie case for shortage, because all they have here is someone saying, some surveyor says that somewhere at destination he determined that there was some shortage. But that is not at the point where we delivered the cargo.

Second, a lot of the things missing are not whole boxes, they are parts of machines.

The proper way to make a prima facie case would have been to take proof that the stuff was there when shipped. The bill of lading isn't going to help the Court, nothing here says that those parts were in this shipment. While he may show they are missing, he can't show they were in the shipment, and it is elementary in a cargo case that you always go to the point of origin and prove the cargo was there when you have boxes. Why? Because the bill of lading says "Received in apparent good

order and condition boxes," not what's in it. We don't know what's in it. And because of that it is necessary in every cargo case, unless you lose the whole box -- if you lose the contents or parts, like here they are losing keys and switches on machines, and headlights are missing -- this sort of thing you have got to prove your prima facie case by going to the place -- in this case they would have had to go to the shipper and prove those articles are there. So they completely missed half of their attempt to prove a shortage claim.

Even as to the shortage claim, I would have a claim for indemnity here because the captain said there was some pilferage going on and he put guards on, so that if any pilferage occurred as to any particular item, if they are going to prove a shortage against the carrier, you must prove (a) you gave him the piece, (b) it wasn't there when it was delivered.

It is much to say about a small claim but the fact is they never claimed it was there when delivered to us. The evidence is not in the record.

Secondly, there is no proof here that on delivery from the ship to whoever received it, that these things were missing at that time. They might have been pilfered anywhere along the way until the surveyor made his

count some time later, weeks later, at another place. The pilferage could have occurred anywhere.

THE COURT: Your delivery was made at Iligan City, wasn't it?

MR. DE ORCHIS: Yes, at ship's tackle. There are reams of cases that point that out. Delivery takes place at ship's tackle upon discharge. The Carriage of Goods By Sea Act ends there. The Harter Act ends there, the carriage responsibility. In every case the cargo shipper takes these two items of evidence. In this case all they are going by is some loose language in the surveyor's report.

Mr. Corsa reminds me in the Philippines the cargo is delivered to Customs, and there is a receipt which Customs gives the ship on behalf of the consignee. Not even that receipt is in this case.

MR. MALOOF: It is not in the record, that is for sure.

MR. DE ORCHIS: I am saying what is not in the record.

MR. MALOOF: If your Honor please, you may have some concern in your mind on why Mr. De Orchis spends so much time talking about a $6000 shortage case when we have sued him for $2.2 million water damage to our

cargo which is a total loss. It might be the fact in this shortage case he seeks the counsel fees from the other law firm, and this kind of thing nettles him very much.

We are not giving up the shortage case. The captain admitted there was pilferage in this case.

Now, your Honor, it is very hard to follow that kind of an act, but I would like to refer you to Plaintiff's Exhibit 4, which is the contract of affreightment in this case. This is the original agreement between New York Navigation and Iligan. Mr. De Orchis, I think, said that all of a sudden there was no longer any July 11th contract, that we now had a bill of lading which had superseded it.

Paragraph 11 of the contract reads:

"In all other respects, the loading and transportation herein shall be performed in accordance with New York Nav's standard bill of lading, copy of which is appended to this agreement."

Apparently it wasn't even appended.

"In the event any clause in such bill of lading is inconsistent with any part of this agreement the agreement shall be controlling."

And then New York Nav agrees -- New York Nav

agrees to stamp the bill of lading. And they didn't do that either.

So I just couldn't follow how he says when the shipper took the bill of lading that was an agreement, and the bill of lading, in the back of all those printed clauses, said that prior agreements are no longer valid. I don't think I have to dwell too long on that, your Honor. You just can't do that. The original contract is still the contract. There has been no waiver and the bill of lading is a subservient document forever.

Your Honor indicated yesterday that you wanted me to, first of all, discuss New York Navigation and our theory of why they are in the case, but if I may, some of the points I heard this morning may take a little discussion.

The first assertion by Mr. Warner, that there is no evidence in the record of wilful conduct, we do admit there was no special malice towards this cargo. However, we did prove, and I think it is undisputed, that Weyerhaeuser knew the ship was leaking at the time it left Baltimore. The captain admitted it. Mr. Baumgartner and Mr. Mandle admitted it. Three of those people admitted the ship

was unseaworthy in such a condition. They were buttressed by Iligan's expert witness, Captain deBouthillier, who I thought was a very forthright witness, exposed himself to cross examination but was not treated to any, and his testimony is completely unrebutted.

I am not going to swell on due diligence in this case. I am arguing that they knew the ship was leaking and flooding. If I have o go in and prove that even when they know that they still didn't exercise due diligence when they didn't fix it, well, I am just not going to do that. I may put a footnote in my brief respecting it.

There is just nothing in this case about due diligence. It is all a wilful sending of an unseaworthy ship to sea.

I don't have to prove that they knew the cargo was going to end up practically a total loss. Captain deBouthillier testified without contradiction the damage to the cargo was certain. The other side had a right to put an expert on and say that wasn't so, it could have been lucky. They didn't even do that. The proof in this case is that the damage was inevitable and certain when it left Baltimore.

For Mr. Warner to argue that some failure in

reading the soundings of water in the cargo hold is an error in management I just don't understand, because the testimony is that the reason you read those soundings is to see how much water is in the cargo hold. If that is not care and custody of cargo, nothing is.

Your Honor put a question to Mr. Warner whether there was a difference -- you were talking about privity at that time, you and Mr. Warner -- and I certainly agree that if Mr. Warner can prove that the shipowner had no privity or knowledge of this condition he could limit his liability to the value of this ship plus its pending freight, which, incidentally, I think he has alleged at about $637,000. But you asked him whose burden it was. I think he said the plaintiff. The law says it is Mr. Warner's burden. I think your Honor probably knows those cases.

Now, does privity have any part in the $500 package question? No. A captain can deviate. All the cases say so. A captain can put cargo on deck and the shipowner will have on $500 package limitation at all. So I don't even need privity to defeat the limitation in this case. But as long as I had it, I thought I would put it into evidence, your Honor.

The point was made we wouldn't be entitled to

interest. Walking out of a courtroom when another lawyer says to me, "I will pay you $107,000 with interest," first of all, I don't admit what are packages in this case, I don't know if $107,000 is enough money, I don't think that cuts off my interest in any way at all. They should prove what the limitation is and put that money in court, your Honor. I am not going to spend much time on that point.

There was one thing, and I am probably making a mistake mentioning it but it galls me. There was some question about language in a decision of the Second Circuit Court of Appeals about no crocodile tears for cargo insurance companies. If it please the Court, I don't recall the exact language. I do know I didn't like to read it, and, if your Honor please, as long as I read things like that in decisions, if it means that a cargo insurance company is a second-class citizen compared to the insurance company that insured these defendants, I don't care how long I read it, it won't be the law as long as we have a Constitution.

Mr. De Orchis mentioned plausible explanations to the leaks. I am confident your Honor will find there have been no plausible explanations. The captain did try to explain why he left port knowing his ship was

leaking. He mentioned tasting the water and it was fresh.

Captain deBouthillier said the only way he could have tasted it, since there were 3000 tons of fertilizer in that hold, was at the end of the sounding stick which had chalk on it, and he said that was ineffective. That was the only way he could have. That was tasted in Cristobal, and he left Baltimore some time before that, so that couldn't have been in his mind about the taste.

He had previously been in Portland where the marine superintendent, who he admitted knows much more than he, told him, "Captain, this couldn't be fresh water," as if to say stop thinking that way.

The other explanation is, on the lumber voyage -- sweat. Well, I have never heard of a case where sweat caused that much. I won't go into that. But how can sweat cause it? You have five holds in this ship and most of the water shows up in one, and the ship was chock full of lumber. It's just another effort. I don't think you will fine one plausible explanation.

I am not asking you to use hindsight but as it turns out we do know what caused the leak. The captain should have known before he left. He didn't learn

because he sent the ship to sea in a condition with a leak in it. He didn't bother to find out what was causing it. This is the whole case. This is plaintiff's case.

We don't make a big point out of what caused it. You are just not supposed to do that. If you know that the ship is leaking in hold Nos. 2 and 3, you don't leave until you learn what's causing it. That's the wilful part of this case. That is the wilful misconduct. And, if you will, under the Wildomeno case, that is the recklessness of it.

As an aside, Mr. De Orchis said your Honor should not be surprised that defendants didn't bring any witnesses on, and I say that with full knowledge there was a man from tampa here, but he took a flashlight into a dark hold and said there was no evidence of leakage.

The evidence is that the defendants hired two metallurgists in this case to examine this valve. Your Honor hasn't had the pleasure of hearing from those two people.

MR. DE ORCHIS: I don't know of any such evidence.

MR. HALOOF: Maybe one of them lost the valve and they didn't want to be exposed to that. There

is evidence the valve was lost and we asked them please keep it, even before the ship got to Iligan we sent them a letter. What else could we do?

If it please the Court, I will discuss New York Navigation first. I will admit there is nothing in the record that shows that they knew that the ship was leaking before it left Baltimore. This is New York Navigation only.

I won't admit they didn't know it was leaking because I don't know. There is nothing in the record, and I haven't been able to prove it. But I think Mr. De Orchis doesn't realize yet why he is in the case, although it is in the plaintiff's brief.

Your Honor hit upon the reason partly when you were questioning Mr. De Orchis about that express warranty of seaworthiness. I disagree slightly at least with Mr. De Orchis that a breach of an express warranty is a lower degree of fault than negligence. I think when you make an express warranty of seaworthiness you are telling the other side, "I am going to see that this is done, but I don't have to do any special thing, it's going to be done."

Now, the cases are clear on that, that an express warranty is an absolute -- I think I could use

the term "insurer" in connection with a breach of warranty with great confidence that the cases would support me.

Now, that is in the July 11th agreement. But Mr. De Orchis refers to the Carriage of Goods By Sea Act and says, well, despite that we did refer to a bill of lading in this case. Well, even though it is a secondary document I suppose we should look at it. But before we look at it why don't we see whether the Carriage of Goods By Sea Act applies by law. Does it protect New York Navigation by law? Because if it does he certainly would have its benefit.

Now, the COGSA, if I may use that expression, your Honor, is applicable to "every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea."

COGSA covers it from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

Then the COGSA applies. If you don't have these two things it doesn't apply by law.

Now, obviously, if we have two documents they both can't be the contract of carriage, they certainly can't both be the document of title. It would destroy international trade. So we must analyze the two.

We have the July 11th agreement, and the bill of lading. If the bill of lading survives the July 11th agreement I suppose the bill of lading would be the contract of carriage. It so happens that the agreement made in July says that the bill of lading is subservient to the July agreement. So to our way of thinking the July 11th agreement is the contract of carriage, and since it isn't also a document of title the Carriage of Goods By Sea Act does not apply ex proprio vigore to Mr. De Orchis' client.

Now, Mr. De Orchis might say, well, but the bill of lading incorporates it, so therefore by contract we have this limitation.

THE COURT: The contract says, does it not, the goods are to be carried pursuant to a bill of lading, copy of which is annexed hereto?

MR. MALOOF: Yes, sir.

THE COURT: I suppose you would say that that is what gets the carrier into the COSGA.

MR. MALOOF: Yes, but it applies only if the bill of lading is the contract of carriage. But the bill of lading is only a secondary document which is attached to the main contract of carriage in this case.

I think a study of the law will show, your Honor,

it does not apply to this case by law. There are precedents, your Honor.

MR. DE ORCHIS: The Court of Appeals, Judge Friendly wrote a long decision in Farland, and they were the lawyers in the case.

THE COURT: I don't follow that comment, but go ahead.

MR. MALOOF: Neither do I, your Honor.

To the argument that the COGSA -- we maintain strenously our position it doesn't apply by law and we ask your Honor to study that point very carefully, as I know you will.

They will also argue then if it falls as not applying by law that it is incorporated by contract. The paramount clause in the bill of lading says, in effect, that it will apply to the Carrier, capital C: "This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act," et cetera, and then down to "And nothing herein contained shall be deemed a surrender by the Carrier," capital C, "of any of its rights or immunities."

When Mr. De Orchis quotes that in his brief he left off the capital C and made it a small c, for his own reasons, I suppose.

Now, on clause 1(a) we have a demise clause where New York Navigation is telling Iligan regardless of everything that has been done we are not the carrier in this case. I suppose they wouldn't really make that point too strenuously until they got their freight. But in that paragraph it says: We are not the carrier; we are something else.

And then in 2, Carrier in the bill of lading, capital C, is defined as follows:

"The word Carrier shall include the ship, her owner, master, operator, demise charterer -- if I may, your Honor, that is bareboat charterer with the charterer's crew -- "and if bound hereby the time charterer" -- I will come back to that -- "and any substituted Carrier, whether the owner, operator, charterer or master, shall be acting as Carrier or bailee."

Now, sir, this charter party is referred to by the defendants throughout as a time charter because on the top of it it says "Time Charter." I can call a horse an elephant but it wouldn't make him an elephant. If you read the purpose of this charter it is for one voyage to the Far East ending on the West Coast.

Mr. De Orchis' client, sir, was a voyage charter, and therefore by his own definition in his own

document, his own form, he is not a carrier. Therefore, he never intended ever to have a limitation of liability in this case, and he doesn't have one. And this has nothing to do with wilful misconduct, your Honor. And that is why he is in the case.

THE COURT: Do you say that New York Navigation is a carrier or is not a carrier?

MR. MALOOF: It is not a carrier, but it is bound by the contract of July 11, 1966.

THE COURT: So you don't care --

MR. MALOOF: He did promise to supply a seaworthy ship and he didn't do it. He is not a Carrier, capital C, in this case.

THE COURT: I don't know what difference it makes whether it is a capital C or a small c. Are you saying that New York Navigation is not a carrier?

MR. MALOOF: For the purposes of the Carriage of Goods By Sea Act, and its use in this case, he is not the carrier, by his own admission. Therefore, he doesn't have the Carriage of Goods By Sea Act.

THE COURT: Maybe he doesn't have certain responsibilities that a carrier would.

MR. MALOOF: Maybe not, sir, but he still has the warranty in the July contract without any problems of due diligence or anything else. And that is a breach

of contract for which he owes Iligan their loss which is directly flowing from that breach, no matter what he is.

By the way --

THE COURT: Let me ask you --

MR. MALOOF: May I clarify something?

THE COURT: Let me ask you this first and maybe it will clarify it.

You say that the essence of your claim is that everybody here acted with reckless, wanton premeditation, whatever the formula is -- that the captain left the ship to sail knowing that it was leaking and not knowing what the cause of the leak was, is that it?

MR. MALOOF: Basically, but if I may put it another way --

THE COURT: That is the way you put it. Do you stand by it?

MR. MALOOF: That is basically it.

THE COURT: New York Navigation did not let the ship sail knowing that it was leaking and not trying to find out the cause, did it?

MR. MALOOF: Oh, wait a minute. In the first part of my talk, I admitted that there is no proof that they knew.

THE COURT: All right.

MR. MALOOF: They certainly did not know -- they did not look for the cause. They did not even check to see if it was seaworthy, your Honor. They did not do anything.

THE COURT: The argument that you made with respect to what you claim the evidence shows as to the knowledge and behavior of the captain, this wanton recklessness, and that he knew the thing was leaking like a sieve but he let it sail anyhow -- this does not apply to New York Navigation, does it?

MR. MALOOF: Basically your Honor is right, except for my point as is expressed in the brief, that your Honor could hold that Weyerhaeuser acted as agent for New York Navigation and their knowledge would be the knowledge of New York Navigation. Aside from that, New York Navigation had no personal knowledge, I agree.

THE COURT: All right. Then does it not follow, leaving out this little wrinkle about somebody being an agent -- that is a wholly different issue -- does it follow that you do not have any wilful, wanton claim against New York Navigation?

MR. MALOOF: Yes, sir.

THE COURT: You have a claim for breach of warranty.

MR. MALOOF: Yes,sir, breach of contract, breach of warranty. I think your Honor is right, aside from the agency.

THE COURT: All right. Then the question is, what is your right under the contract in which they warrant the seaworthiness of the vessel?

MR. MALOOF: Right, right.

THE COURT: Now Mr. DeOrchis argues that really warranteeing something is not very important. It is the least that anybody could do, but I take it you argue that it is quite important and that if they warranteed seaworthiness it ought to be seaworthy.

MR. MALOOF: You may recall Mr.Best testifying that clause 1 of the July 11 contract -- clause 1 was put in at his insistence, that it was awfully important to him to have a seaworthy ship. This was valuable cargo.

THE COURT: I am not deciding anything at this point; I am just trying to understand the contentions, but as I get it -- and maybe you will change it all when you go to write a brief, but as I get it, this wilful, wanton theory, to get away from the limitation protection theory, applies only to your claim against Weyerhaeuser and really in a sense your claim against New York Navigation is easier because you say you have an express written warranty.

MR. MALOOF: I think so, except for the agency argument -- I think your Honor has expressed it quite fairly.

THE COURT: All right.

MR. MALOOF: But I do want to go back and correct one other thing on our argument that New York Navigation is not a carrier, with a capital C. We say that because

the bill of lading says with a capital C and in some places small c --

THE COURT: What difference does it make?

MR. MALOOF: Because for the purpose of our argument they do not have the benefit of the Carriage Of Goods By Sea Act. They are not a carrier. They may be for other purposes under the July 11th agreement. After all, they did make certain promises. After all, it is a contract of affreightment, so I do not want to agree to something which is not true. They could have other duties of a carrier aside from my argument, nevertheless. Mr. DeOrchis has admitted they are not carriers. I just want to make that amendment to my position, your Honor.

By the way, it is also important that in clause 17 of the bill of lading -- I am sorry, your Honor, that it gets a little confusing there. We will have another opportunity to write a brief, and I want to spell that out very carefully for you, sir.

It is clear in my mind, but it is a little hard to express it to you.

All I am saying is that they intended to give the cargo carriers the language that New York Navigation is not a carrier. So I am arguing that for that purpose that New York Navigation has argued it is not a carrier,

and for the purpose of whether or not the Cogsa applies, we agree that with New York Navigation that is not a carriex, and if it is not a carrier it does not have the limitation of law, and if they do not have the limitation, then New York Navigation owes my client $2,200,000.

THE COURT: Regardless of whether or not they knew that the ship was --

MR. MALOOF: Regardless, a breach of warranty.

THE COURT: But as far as Weyerhaeuser is concerned --

MR. MALOOF: That is something different.

THE COURT: They knew the ship was leaking.

MR. MALOOF: Of course, your Honor. They are in a completely different position.

THE COURT: All right.

MR. MALOOF: Clause 17 of the bill of lading is a repeat performance of the $500 package, but it does not read exactly the same as Cogsa.

The point is that it reads in the first part of it -- they are saying that the carrier shall have the benefit of these limitations, with a capital C. So my same argument applies that New York Navigation saying they are not the carrier, they would not have the benefit of clause 17 in their own form.

By the way, the Supreme Court case -- well, I will withdraw that comment.

If your Honor please, I would like to just make a comment about New York Navigation's failure to stamp this bill.

This is a promise in the contract also. The purpose of that I think is obvious, and that is that the shipowner, whoever he may be, should come within its provisions, and that the July 11th agreement should be paramount over the bill of lading, but they did not stamp the bill of lading.

I have a claim that from that breach of contract Iligan should be entitled to damages. And what would the damages be?

Suppose your Honor holds that Weyerhaeuser is not guilty of the things I say it is -- they did not know the ship was leak ng and they have a package limitation. I should think it might be only because the bill of lading was not stamped, because then they would have a direct express warranty, and they would be responsible without limitation on that ground. And besides that, knowing that they have an express warranty perhaps they would have been a little more cautious and --

THE COURT: I would say it bothers me that that

bill of lading was not stamped, but I do not think there is any evidence as to why it was not stamped -- is there?

MR. MALOOF: No, sir, except they did not do it. I was getting objections. I was trying to get something from Mr. Grevers but Mr. DeOrchis did not allow him to be exposed too much in that direction.

THE COURT: Well, Mr. Grevers apparently did not handle it personally, and nobody that had any personal contact with a simple transaction of issuing a bill of lading was called. Your people did not see to it that the bill of lading was stamped, so far as the evidence shows.

MR. MALOOF: If it please the Court, by the time Iligan saw that bill of lading it was about two months later. It first had to go to the Philippine Consul in Washington and then sent to the Philippines.

THE COURT: How about Mr. Pereyra?

MR. MALOOF: Mr. Pereyra was in Pittsburgh. The bill of lading was sent to the freight forwarder.

THE COURT: And you had a freight forwarder -- he was supposed to look out for your interests.

MR. MALOOF: That is right, but is that a waiver of everything under the sun?

THE COURT: I do not know, but it seems odd that nobody on either side has called a witness who could

explain, if there is an explanation, why this stamp was not put on the bill of lading which it seems to me offhand is an important fact.

MR. MALOOF: I think so, too, and I think the main one to explain it is the one who failed to do it.

THE COURT: Well, it may be.

MR. MALOOF: If your Honor please, I might refer to Plaintiffs' Exhibit 14 where it says -- this is New York Navigation Company's freight bill:

"We certify that the contract dated July 11, 1966, has not been terminated," and signed by Joseph A. Arego, who I assume works for New York Navigation.

So I think that is fairly relevant on Mr. DeOrchis's argument that the July 11th contract was nothing any more. It was still alive and in full vigor.

So just to wind up my last comment, your Honor, I think the damages for failure to stamp the bill of lading would be in case Weyerhaeuser is out, which I doubt, and we are limited to a package limitation, so I think the difference must be paid by New York Navigation in this case.

THE COURT: You contend, I take it, that even if I were to hold that Weyerhaeuser has the benefit of the package limitation because you have not satisfied me that they actually knew that the ship was leaking -- maybe all

they knew is that there were 18 inches of water in the bilge some time or other, but even if that follows, that all you get against Weyerhaeuser is the package limitation that they have heretofore offered you, that you would still get the balance against New York Navigation?

MR. MALOOF: Yes, if the causation can be traced to the failure to stamp the bill of lading.

THE COURT: On a straight breach of warranty theory, on the theory that it was not signed.

MR. MALOOF: Oh, yes, on that theory, too.

THE COURT: And if this warranty survives any contrary language in the bill of lading, because even though it wasn't stamped, it should have been stamped.

MR. MALOOF: Well, the stamp has nothing to do with the warranty.

THE COURT: The stamps are what preserve the contract, isn't that so?

MR. MALOOF: No, no. The stamp merely notifies the shipowner of the prior agreement.

You see, the agreement of July 11 itself makes the bill of lading subservient to the July 11th contract. We do not need the stamp on the bill of lading for that.

THE COURT: What was the stamp supposed to say?

MR. MALOOF: Well, let me read clause 11 in the

contract of July 11th:

"In all other respects the loading and transportation herein shall be performed in accordance with NYNAV's standard bill of lading, copy of which is appended to this agreement. In the event any clause in such bill of lading is inconsistent with any part of this Agreement, the Agreement shall be controlling."

It has nothing to do with the stamp. The stamp comes later.

THE COURT: What was it supposed to do?

MR. MALOOF: "NYNAV agrees to stamp all bills of lading as follows: 'All the terms and conditions of this bill of lading are subject to and governed by the written contract entered into between IUSMI and NYNAV for the performance of this transportation'."

So you see there are two sentances there. They both say the bill of lading is subservient. The stamp is for the purpose of letting the shipowner know, because it is signed by the master. The master signs the bill of lading.

THE COURT: You cannot have it both ways. Either the stamp was important to you or it was not. Now you seem to be arguing at the moment that it really was not important because you had it in the contract anyway.

MR. MALOOF: May I be heard on that, your Honor?

THE COURT: I just want to get straight what it is that you are claiming.

MR. MALOOF: The stamp has no relevance to our claim against New York Navigation. It was not necessary on the bill of lading for our argument against them. It only has relevance to the case against Weyerhaeuser because Weyerhaeuser then would have had knowledge of the prior agreement of July 11 and would have been bound thereby, because the captain would have signed the bill of lading knowing of an earlier agreement, and the bill of lading itself would have been stamped that the earlier agreement was the contract of carriage. It has nothing to do with New York Navigation.

THE COURT: Then I guess I misunderstood you.

MR. MALOOF: There are precedents on all of this, your Honor, but I suppose again this is a concept which I am having difficulty setting forth.

As far as our claim against New York Navigation having broken an express warranty of seaworthiness, they broke it whether or not they stamped the bill of lading, your Honor.

THE COURT: Because you maintain that this written contract survived --

MR. MALOOF: The bill of lading.

THE COURT: -- takes precedence over the bill of lading?

MR. MALOOF: Yes, sir.

THE COURT: Regardless of whether they put the stamp on the bill of lading that they were supposed to.

MR. MALOOF: Yes, that is not conditional.

There are three sentences in that paragraph. The first one says that any inconsistent terms in the bill of lading will fall if compared with this agreement. This agreement is paramount.

THE COURT: All right.

MR. MALOOF: May I proceed, your Honor?

THE COURT: Yes, let us finish it up.

MR. MALOOF: With regard, then, to our main point against the shipowner and vicariously against New York Navigation Company, we have always looked upon this part of the case as a rather simple case, but simple cases very often have the most traumatic results, and this one of course did.

The record is quite clear that the defendant Weyerhaeuser knew that the hold had a serious leak for the two prior voyages.

Your Honor has not had the benefit of reading the

depositions carefully, and I think it is hampering you already. I told you before that this was the meat of the case -- and believe me it is -- the depositions and the logbook. During the case I read the master's deposition but I made the mistake of reading it too fast,and I am sure it left little impression.

The point I wanted to make was that I wanted to impress your Honor with the progressive nature as to the extent of this leak. Your Honor has caught that in this case because your Honor mentioned it to Mr. DeOrchis, that what started as a little thing becoming a Niagara Falls if it isn't taken care of.

So the proof is quite clear, from the logbooks and the depositions that the defendant Weyerhaeuser knew that hold No. 3 had a considerable entry of water and serious leaking for the two prior voyages over a period of seven months, that they had flooded on the prior voyage. This much and more was admitted by Captain Dumble, who also says he did not know what was causing it.

The chief engineer did not know why the water was coming in, but they knew of the floods.

When the new chief engineer came aboard in Baltimore,Captain Dumble told him, on page 167:

"I told him we had a lot of trouble."

Now it is not necessary, as I have said before, for plaintiff to proveprivity to displace this as more than a deviation or wilful misconduct, but the proof is clear that the logs were delivered to San Francisco at the end of the Madras voyage at least. They were read by the marine superintendent and the port engineer; that the logs themselves show it seriously is clear from Mr. Mandle's testimony. Mr. Mandle was the operating engineer of the Weyerhaeuser Company.

I think your Honor can dismiss from your mind all of this loose talk about the fact that ships are supposed to leak. I do not think anyone would take a cruise if that were the case, if ships were supposed to leak. Now a little water in a ship at one time which when pumped out does not come back. I think I would be the first one to agree that it is not a real problem, but when it keeps recurring in the same hold,and not in other holds -- I had to learn this from seafaring people -- that is a very serious problem. The ocean is coming into the ship. The ship is only a vessel which is displacing its own weight on top of this ocean, because of very, very fine scientific reasons. If the ocean comes into that ship, everybody on board is in a great deal of trouble after the cargo becomes a total loss. Who goes next?

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Mr. Mandle, on pages 26 and 27, says:

"You must investigate the reasons for recurring readings in No. 3 port" -- in June of 1966.

On page 27:

"You would certainly want to pump and observe the readings of 15 inches" --

THE COURT: I do not think you need expand this as though you were summing up to a jury. That isn't what I wanted.

MR. MALOOF: All right, sir.

THE COURT: I will read the depositions and all the other testimony.

I just wanted a statement of your theory, and I think it is perfectly clear, I hope, as far as the theory against Weyerhaeuser is concerned.

MR. MALOOF: All right, sir.

THE COURT: I am not entirely sure of what you are claiming against New York Navigation.

MR. MALOOF: Have I helped on that? I will be willing to speak some more on that.

THE COURT: I think you concluded by saying that you were entitled to recover the full amount from New York Navigation even though you only got the package limitation from Weyerhaeuser.

MR. MALOOF: Yes. There is a difference between the two, definitely.

THE COURT: So you regard New York Navigation as the prime target?

MR. MALOOF: No, not hardly, and I don't want to get into the claim offer of Mr. De Orchis. I think the shipowner could have saved everybody a lot of trouble if he had not worried so much about his schedule and taken the time to spend a little money on this ancient ship and fixed it.

THE COURT: All right. If you want to write more briefs, I will certainly give you a chance.

MR. MALOOF: Judge, I may not --

THE COURT: You were about through, weren't you?

MR. MALOOF: I guess I am, if your Honor doesn't want to hear any more.

THE COURT: I don't think we can profit from

discussing it further at this point.

If you want to write some more briefs you can have right up until September 5th to do it, because I am not going to have any chance to look at this until I get back here after Labor Day.

Do you want to have main briefs and reply briefs?

MR. MALOOF: I think briefs ought to be exchanged on the same day, your Honor.

THE COURT: Then do you want reply briefs?

MR. MALOOF: I don't think we need that. Do you? We have one full brief in already.

THE COURT: You have already written about 50 pages of briefs.

MR. MALOOF: I think another brief to wrap up the testimony, your Honor, really.

THE COURT: I think one more brief from everybody is all that I could reasonably be expected to read. So suppose we say that you exchange them and file them by August 31st.

MR. MALOOF: August 31st?

THE COURT: Yes. So when I get back here I will find them, and I won't guarantee that I am going to start on this case immediately because there

will be many other things.

Now, if you will give me that other main deposition I might just keep these three depositions so that hopefully we can get a little work done on those before I go aeay.

MR. MALOOF: It was here, your Honor. We don't know who has it.

Mr. De Orchis, do you have it?

MR. DE ORCHIS: What?

MR. MALOOF: Mr. Baumgartner's original deposition.

MR. WARNER: You may have our copy, your Honor.

MR. MALOOF: There is one outstanding matter.

THE COURT: What is that?

MR MALOOF: You will recall an exhibit of the defendant which was the Iligan voyage file, with the whole bunch of papers in it, and your Honor agreed those papers ought to be punched or something to be identified.

THE COURT: Yes.

MR. MALOOF: I was talking to the clerk this morning and I think she is unsure how to do it.

MR. WARNER: She did it. I saw her do it.

She was as busy as could be with it.

MR. MALOOF: I apologize for that.

THE COURT: And I have found the Baumgartner deposition.

MR. WARNER: Shall we deliver the exhibits the same day, the 31, with the briefs?

THE COURT: Yes. You need the exhibits to work on the briefs, presumably. I have copies of the depositions, I don't need those. Submit the exhibits with your briefs on August 31st. There may not be anyone there to take them, but you can get them under the door somehow.

MR. DE ORCHIS: One sentence, your Honor. You asked me such a simple question that it threw me, about does the package limitation apply to warranties. The answer is so simple, and the question was so simple. Before the Harter Act and before the Carriage of Goods By Sea Act all cases under general maritime law were breach of warranty cases, and the package limitation applied even to $12. It was raised to $500.

So before 1893 all maritime cases involving unseaworthiness were breach of warranty, until the Act came along with due diligence, and the Act raised the package limitation to $500.

So general maritime law is the shipowner always breached his warranty and was always entitled to contract for a package limitation.

It just threw me.

THE COURT: All right. This condludes the trial.

Let me just say, without much hope of any results but if you should settle this case among yourselves, please let me know before we do any work on it. I am going to try to get some work done before I go away. It's been stated here several times an offer has been made which plaintiff is not willing to accept. I don't know whether that state of affairs would continue or not. I certainly am not going to get involved in any settlement discussions. All I am saying is that if those discussions should ensue in the light of the fact you have now had a full airing of the case, and if you should, happily, reach an agreement, please let me know.

MR. MALOOF: We will be sure to do that.

THE COURT: We stand adjourned.

I (We) hereby certify that the foregoing is a true and accurate transcript, to the be of my (our) skill and ability, from my (ou stenographic notes of this proceeding

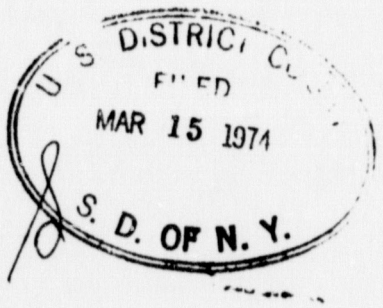
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Official Court Reporter
U. S. District Court

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK



ILIGAN INTERNATIONAL CORP., et ano.,

Plaintiffs,

-against-

SS JOHN WEYERHAEUSER, et al.,

Defendants

67 Civil 1137

February 7, 1974
2:00 p.m.

BEFORE:

JUDGE ROBERT J. WARD,

District Judge

APPEARANCES

DONOVAN, DONOVAN, MALOOF & WALSH ESQS.
Attorneys for Plaintiffs
BY: DAVID L. MALOOF, ESQ.,
of Counsel

SYMMERS, FISH & WARNER, ESQS.
Attorneys for Defendant
SS JOHN WEYERHAEUSER
BY: WILLIAM WARNER, ESQ.,
of Counsel

HAIGHT, GARDNER, POOR & HAVENS, ESQS.,
Attorney for Defendant
New York Navigation Company
BY: M. E. DE ORCHIS, ESQ.,
CHESTER HOOPER, ESQ.,
of Counsel.

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THE COURT: Good afternoon, gentlemen.

We are here this afternoon for what might be considered summations, or closing arguments, in connection with this non-jury case, which was tried before Judge McLean.

You gentlemen, of course, know the usual order of presentation in connection with summations. I would suggest that the Court will be amenable to any order which you wish to--any order in which you wish to present your respective positions. If there is a preference, I will abide it. If there is no preference, I will try to set it up in a logical manner, as I see it. I have no preference myself.

MR. MALOOF: I think your Honor might hear the plaintiff first. As plaintiffs' counsel, I suggest that.

THE COURT: Is there any demur?

(No response.)

There being none, I think it would be logical to hear Mr. Maloof for Iligan. Then we will hear from Mr. Warner for the defendant Weyerhaeuser and then we will hear from Mr. Hooper for the defendant New York Navigation.

If between Mr. Warner and Mr. Hooper they would like to reverse positions, I have no objection there either.

MR. DE ORCHIS: It is Mr. DeOrchis who is going to argue this matter.

THE COURT: I see Mr. Hooper next to you there.

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You gentlemen have a preference as to who would like to go first in connection with your presentation?

MR. DE ORCHIS: I think the first named defendant, Weyerhaeuser, should go first, and the second named defendant should go second.

THE COURT: Is that agreeable to you, Mr. Warner?

MR. WARNER: That's agreeable, sir.

THE COURT: Then we will proceed in that order.

We will begin by hearing Mr. Maloof and then we will go on. I may interject at times with some questions, because I have tried to familiarize myself with the factual background of the case and the several legal issues which are here. So we will begin by hearing from Mr. Maloof on behalf of plaintiff Iligan.

MR. MALOOF: Having then looked over the record, you will know that plaintiff accuses the defendants of causing over $2,000,000 damages to its property.

Plaintiff was the owner of certain parts of an automated steel mill that it wanted transported to the Philippines. Defendant Weyerhaeuser was the owner and operator of the carrying vessel, and also the carrier, because its master signed the bill of lading through its agent, New York Navigation.

Defendant New York Navigation solicited the

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transportation of this cargo and signed a contract, a maritime agreement, with plaintiff Iligan, in which it agreed to supply suitable and seaworthy vessels for the transportation of the parts of the steel mill.

The first shipment was placed aboard the JOHN WEYERHAEUSER, which was nominated by New York Navigation in Baltimore, between December 11 and December 16, 1966.

It was placed in hold number 2. Hold number 2 was a common hold with hold number 3, because the Weyerhaeuser Company had removed a former watertight bulkhead so that it would have a longer hold in order to transport its lumber of its own company from the Pacific Northwest, to the East Coast.

Plaintiffs' cargo that was--

THE COURT: That was a bulkhead, as I recall, which was non-watertight and consisted of boards covered with burlap.

MR. MALOOF: The original watertight bulkhead had been removed. Before the shipment of Iligan's cargo was put in hold number 2, New York Navigation built a non-watertight wooden bulkhead to place between hold number 2 and hold number 3, because they knew they were going to place 3,000 tons of trisodium phosphate in hold number 3, and this was their effort to keept it separate from plaintiffs' valuable

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cargo. It would have been kept separately, of course, if the ship didn't leak in hold number 3.

But, of course, the wet fertilizer came right through the bulkhead. Plaintiffs' cargo arrived in the Philippines under 15 feet of seawater, mixed with this trisodium phosphate, which is a highly corrosive fertilizer. Even Weyerhaeuser surveyer has estimated the cargo damage at about $2,100,000. There is no dispute in this case, your Honor, by any witness, that the water entered the JOHN WEYERHAEUSER through a corroded, broken and defective clapper valve in hold number 3.

There is no dispute by any witness, plaintiffs' or defendants', that the condition took years to develop. There is no dispute by anyone, that the condition would have been easily noticed if anyone had bothered to look at the valve.

THE COURT: Let's stop there just one moment, so I can be clear relative to your position.

Corrosion resulted in a hold?

MR. MALOOF: Yes.

THE COURT: In addition to that, the clapper valve was found frozen in an open position. Would you just focus for a moment, I understand that corrosion would be a time consuming process. Could you just focus for a moment,

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and I won't interrupt you very much more--

MR. MALOOF: You may interrupt at any time, your Honor.

THE COURT: --to indicate the theory which the plaintiff has relative to the how, when and why, as to the frozen open clapper valve.

MR. MALOOF: Your Honor can understand how long it would take a moving disc to freeze in an open position due to rust. This disc rides on lugs within the valve. It is, of course, subject to rust, corrosive condition because it is designed to service the sanitary lines from some of the crews quarters, so there is water and waste, which comes down the pipe when it is working properly. This is what it is designed for.

Also, when the ship is loaded, this valve is underneath the surface of the sea, so it is designed for seawater to come in, at least up to the disc. The disc is a one-way valve. It goes out, but it doesn't go in. So the seawater is not supposed to come in. You have to inspect these things because you are getting a possibility of rust from both directions.

You can imagine how long it took for the lugs to rust right off, which is how they found this valve. It was rusted in an open position, meaning I don't think anyone

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every looked at the inside of this valve, despite the fact that the designer of the valve went to the trouble of putting an inspection plate on the outside, which all you had to do was take it off and look inside.

There is a picture in the record of Mr. Berke climbing up to look at the valve to show how easy it can be done. You don't even need a ladder.

THE COURT: The Court has observed that picture as well as these numerous pictures of the valve.

MR. MALOOF: I don't delve much on the failure to do this because plaintiff argues this is not a case of simple failure to exercise due diligence. It is just not in the case. Due diligence is the absence of the care needed to find out that there is a problem.

When you know there is a problem, that's a different ballgame. To fail to fix the problem, call it what you will, it has the effect the plaintiff asks your Honor to give it in this case.

The relationship of each defendant to the plaintiff is different in this case, and they will be discussed separately. There are two separate maritime contracts which concern the plaintiff.

One is the charter agreement of July 11, 1966, between Iligan and New York Navigation.

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THE COURT: That is in the case as Plaintiffs' Exhibit 4, and the Court has the contract in front of it.

MR. MALOOF: Yes, sir, number 4.

You will notice that New York Navigation in Clause 1, expressly agreed to supply suitable and seaworthy vessels.

Also relevant will be a bill of lading dated December 16, 1966, signed by the owners' master through New York Navigation as its agent.

THE COURT: Let's stop with that just for one moment.

The agreement itself, the copy that I am looking at, recites on page 9, that standard bill of lading, copy of which is appended to this agreement, and the agreement, as I found it in the file, does not have the New York Navigation standard bill of lading appended. But I assume from everything that I have seen, that it is conceded that that New York Navigation standard bill of lading was appended to the contract.

If there is a question, you might raise it now.

MR. MALOOF: I think it is unclear, your Honor, whether it was appended or not to the agreement. Plaintiff does not make an issue of that. The bill of lading was referred to, the standard bill of lading of New York Navi-

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gation. We don't know whether it was appended to it or not.

THE COURT: I only mention that I have the agreement here and the copy that was left with the Court, and was introduced in evidence, did not have it appended, and I just wanted to ascertain for myself based on some thinking that I have been doing as to whether the failure to have appended it would have created any issue here, and it sounds like, from what you say, no.

MR. MALOOF: Each side provided a copy of the agreement with an appended bill of lading, your Honor, so perhaps it never was attached.

I will discuss first, your Honor, the case against Weyerhaeuser for full recovery. I apologize in advance if you think I am going into too much detail. I think your Honor deserves it under the circumstances of the way you got this case.

THE COURT: Let me just comment, Mr. Maloof.

The Court considers this, as all cases, an important case. There is a considerable amount involved here, there are what I believe to be a number of issues here, and for that reason, when we met and you all stipulated that I could decide the case on the record, I indicated that I would give counsel ample opportunity to present their positions orally after I looked over the record in the case and,

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before I rendered a decision, and that is the reason we are here today.

So, I urge all of you to speak to all issues which you believe are important. Occasionally, I may ask a question, as I have already. There are times when I may be convinced on certain issues but require more enlightenment on others, and at that time, I will try to say so, so you have a general idea of my thinking as the afternoon develops.

MR. MALOOF: Then my immediate remarks as of now will be directed towards the case against the Weyerhaeuser Company.

The difference between them--one of the main differences is that Weyerhaeuser certainly knew the ship was unseaworthy. New York Navigation may have known it, but we don't have that proof in the record. We may have an inference that they knew it because of certain witnesses they failed to put on the stand.

Inasmuch as this was a shipment from a U. S. Port in foreign commerce, and as respects Weyerhaeuser at least, the bill of lading was a document of title, which was also the contract of carriage, the United States carriage of goods by Sea Act does apply in the relationship between Weyerhaeuser and the plaintiff in the first instance.

Plaintiff contends, however, that Section 1304 (5),

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which is the limitation of $500 per package, is not available to defendant Weyerhaeuser because it knew that number 3 hold leaked for two voyages before the instant one, that it didn't tell the plaintiff, although it had an opportunity to do so at Baltimore, that it never ascertained the cause of the leak until the ship arrived in Japan and the cargo was no longer in specie, it never repaired the leak until the voyage was over, it loaded plaintiff's cargo into hold number 2, which is common to number 3, with knowledge that it had to lead.

There are three voyages which are to be considered in the analysis of plaintiffs' point in this respect.

First is the voyage to Madras, India in June of 1966. The JOHN WEYERHAEUSER--that's six months before this voyage, your Honor. The JOHN WEYERHAEUSER carried fertilizer from Virginia to Madras, returning to the Pacific Northwest in ballast, meaning that she was empty of cargo.

THE COURT: And at Madras they had to chop the stuff out.

MR. MALOOF: That's right. And the Madras cargo was discharged wet and the carrier knew it. The ship carried a full load of lumber thereafter from the Northwest to New England. On the Iligan voyage she carried plaintiffs' cargo from Baltimore to the Philippines.

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The facts I will now set forth are fully supported in the trial record and exhibits, and are not rebutted in any way.

From July 5, 1966, which is during the voyage to Madras, India, the log books show continuous pumping of the number 3 port billing. On August 3, the logs show an abnormal entry of water and continuous pumping of the number 3 port billing.

Your Honor has a chart prepared by Captain deBouthillier, plaintiffs' expert, which is Plaintiffs' Exhibit number 75.

Judge McLean accepted it into evidence as an aid to the Court because it is easier to read than the little ones that we have.

THE COURT: I have the exhibit in front of me and I am looking at it.

MR. MALOOF: You will notice from that chart the graphic nature of the facts the plaintiff is now going through.

THE COURT: This indicates, among other things, soundings which were taken and the distance the valve was either under or above the water line during these various voyages.

MR. MALOOF: Yes, sir.

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It indicates soundings over seven inches. Plaintiffs' expert did not bother with readings under seven. It indicates pumping records for the three voyages and it indicates the ship's draft during the three voyages.

THE COURT: I am interested in all of the items. I am particularly interested in the soundings and secondly, in the distance the valve was either under or above the waterline. With the ship travelling loaded the vessel would have been under the waterline, submerged. With the ship travelling light, as I see it here, the valve would be above the waterline.

MR. MALOOF: Yes, sir, that's undisputed by anybody. The captain's testimony in this case is that he knew of those conditions on the Madras voyage. The abnormal water entry and the continuous pumping was within the captain's knowledge. The ship left Madras and sailed in ballast to the Northwest, the Pacific Northwest, but we noticed anyhow that there was still frequent pumping, even though the soundings are not too troublesome, and Captain deBouthillier interpreted this to mean that the officers were nervous about the number 3 port billing and ordered pumping anyway.

This was his interpretation of the way the logs read.

THE COURT: Let's look at that for a moment.

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I am not directing my attention to page 2 of Exhibit 75, which relates to the voyage from Madras to Portland, Oregon, September 7, 1966 to October 15, 1966.

Since the ship was in ballast, as indicated, and since it appears that the offending vessel was above the waterline by a number of feet, 15, 13, and so on, during that voyage, continuously, if I am not mistaken, during that voyage, I am interested in the soundings.

MR. MALOOF: It says no soundings, as if they were not taken, your Honor. There is no soundings at all. It doesn't say zero inches as you see in other parts of the records. And also no soundings in number 5 and number 3 or any of the holds, and yet there is frequent pumping of number 3 port billing.

Captain deBouthillier noticed that an order from the bridge to the engine room at a certain time, I don't remember the exact time on this voyage, to pump number 3, which is a sign, or a knowledge, or a fear, that something may still be wrong in number 3 port billing.

THE COURT: That cuts two ways, as you can appreciate, Mr. Maloof.

The first thought that I had when I saw this was that the continuous pumping through a rather lengthy voyage would indicate to me, a voyage of about six weeks, if I

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remember, would indicate to me that there was something to pump, and it would seem to me you wouldn't be pumping that billing so constantly if there was an intake of water from someplace.

It just wouldn't have taken you all this time to pump a dry billing.

MR. MALOOF: That doesn't cut against the plaintiff at all. I agree there was something to pump, and water could still be coming from the sanitation pipes, and, of course, if you had heavy weather, there could be water coming in too, even though the valve is not under water, there are no soundings.

So we don't know how much water was in the billings. We have no way of knowing on that particular part of the voyage. That is not even one of the three voyages as part of plaintiffs' case of proof, your Honor.

THE COURT: I recognize that.

MR. MALOOF: Although it may still be relevant, of course.

THE COURT: It is, to the extent I notice the offending valve was--this is, of course, relative to the seawater coming in, you still had your problems of the waste being discharged within the valve. But it would appear to me, and I think this is probably undisputed, that the offend-

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ing valve was above the waterline. Yes, you could run into a storm and you could have gotten some intake of water during a storm.

MR. MALOOF: Wave action could possibly put water in.

THE COURT: You are up fairly high, Mr. Maloof. You are 15 feet above water and you are in the Pacific and you are in the Pacific in September, and I would be really quite surprised unless you had some record of severe storms, that you would have any constant wave action at that time of year.

MR. MALOOF: The log books are in evidence. I think we would have some report at least from the crew as to what the weather was.

THE COURT: I believe so.

MR. MALOOF: Of course the main thrust of the case is what did the master and the supervisory officers of Weyerhaeuser know about the condition of the ship.

The captain testified under oath in his deposition, that when the ship arrived at Portland after the trip from Madras, he told Mr. Baumgartner, the Weyerhaeuser marine superintendent, "That this billing," that's number 3, "was showing water and we had to keep pumping it out."

The master testified that the entry of water like

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that is abnormal and unusual and it was his duty to report it to the ship owner, which he did, in Portland. This is several months before the Iligan voyage, your Honor.

During the stay in Portland, he asked the marine superintendent to check for a leaking plate. It was checked and no leaking plate was found. Then the captain mentioned a possibility of a feedback of fresh water to Mr. Baumgartner, who is, by the way, in charge of all repairs to Weyerhaeuser vessels.

Mr. Baumgartner told the captain this was not possible, that there were no fresh water lines in number 3. They were in the engine behind a watertight bulkhead and no possibility of a feedback

Dumble, that's the captain, Mr. Dumble, also testified that he probably told the ship owners of the leaks again while the ship was at Baltimore and probably again while the ship was at Cristobal two weeks with readings in number 3 of 38 inches.

This is 20 inches, of course, over the billings. He said at that time, "It was the same old recurring trouble." The captain knew that on the coastwise voyage, when it carried Weyerhaeuser lumber, only the number 3 porthold showed water over the billings, 24 inches, meaning the cargo was six inches under water. This is the voyage before the Iligan

lhe 18 cargo. The captain testified that is excessive and unusual. He testified he read the log books every day and then he signed them and he knew of the entry of the water from the records.

He admitted that on the two prior voyages, the number 3 cargo billing required much more pumping than any other billing, and that that was significant, and that there might be a reason for it. He also noticed that more water entered the ship when she was loaded than when she was light.

He knew on the lumber voyage that the lumber must have had contact with the sea, and he testified under oath that fresh water had nothing to do with it. He certainly knew at Baltimore where the soundings were 18 inches, which is the depth of the billing well, that one more centimeter of water would put it over the billings and into Iligan's cargo, and this is while the cargo is being loaded.

He knew between Tampa and Cristobal during the voyage, that number 3 lower hold was flooded and still did nothing.

THE COURT: Let me ask you this. What could he have done after the fertilizer was loaded, after he had left the last port there?

MR. MALOOF: The testimony is that this fertilizer

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sucks up a lot of water before it finally reaches the bottom. If he had discharged our cargo at Panama, as Mr. Mandle, the operating engineer said he would have done, if he had known about this, there may not have been any damage at all.

THE COURT: As a matter of fact, I think it is fair to state that once that fertilizer was in place, you couldn't make an adequate inspection of the clapper valve, could you?

MR. MALOOF: No. It was under the fertilizer, that's right, sir. That's true. It is too late then. But, of course, at that time, 7,000 tons of fertilizer went aboard at Tampa. That water just came pouring in because the hole had opened up more. It was a progressive position, your Honor, and finally it came in like a firehose at Moji.

As for the supervisory officers of Weyerhaeuser, the testimony is that the logs, deck and engine, both, are mailed, delivered or handed, to them at the end of every voyage. This is done according to company rules, and it was done.

Incidentally, when the new chief engineer came aboard the WEYERHAEUSER at Baltimore, Captain Dumble said he told him, "We have a lot of trouble." Mr. Baumgartner on his deposition--

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THE COURT: The new chief that you are talking about came aboard, as I recall it, at Baltimore following the return from the Far East.

MR. MALOOF: Following the coastwise voyage, your Honor. The ship brought Weyerhaeuser's own lumber around from the Pacific Northwest to New England.

THE COURT: That was Madras to Portland and up the Coast?

MR. MALOOF: Right. It picked up lumber in the Northwest. Then it came around with the lumber to New England, discharged it. The old chief engineer was fired. Before he was fired, he hadn't kept the engine log properly, so we have a gap there of some facts. They put on a new chief engineer for the New England voyage. Captain Dumble is telling him he has a leaky ship because he says he told him, "We have a lot of trouble."

That's in his deposition under oath.

THE COURT: That general statement, frankly, would seem to me to cause somebody to conduct an inquiry, but I am a little disturbed as to the specificity of that "we have a lot of trouble." The chief engineer might have been a good man, but, really, was he supposed to immedately go to the clapper valve? Is that the only possibility? We had been talking a few moments ago about these various

the 21 possibilities, and I have to look to a certain extent, I think, to the prudence of the chief engineer, because this is really within the engineering department.

You feel that he didn't act prudently and properly, I should think, because he had your client's cargo which, had not yet been damaged by the water, would not have been. I'd like you just to comment on that for a moment, if you could.

MR. MALOOF: I think the comment that "We had a lot of trouble" must be read in the context of the deposition. The captain is telling the new chief engineer that the ship is leaking. If you will read the deposition with that in mind, I think that will bear me out.

I don't have to prove that the ship owner, or the new chief engineer knew the clapper valve was leaking or that there was any trouble with the clapper valve. I certainly don't intend to speak for two minutes about due diligence in this case. This is not a due diligence case. I have been offered very vague amounts, to be sure, but a rough due diligence amount, many times.

THE COURT: I will disregard that offer--

MR. MALOOF: It may be they failed to exercise due diligence. I will be very happy to agree to that.

THE COURT: For the present purposes I will sug-

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gest that you should not spend a great deal of time on the aspect you just touched on. I think you can rely on certain observations that the Court will be making. I don't want to cut you off, but I think we will get past one point, I think it is really a question for you as to whether you go by the package limitation and get what you are seeking.

I don't think it is a question of whether you are going to get anything. I might as well apprise counsel for the defendants of that thought that I have.

I think the big question here, and I am sure they know it too, is whether or not they can stand behind the bulwark with the package limitation. I don't think really it is a question of whether or not there would be a recovery for Weyerhaeuser.

MR. MALOOF: I don't know if I have responded sufficiently to--I think I have, in view of that comment, that what the record shows in plaintiff's opinion, your Honor, is that the ship put this cargo in a known unseaworthy hold, knowing that the cargo was certain to be damaged, or else was guilty of gross negligence in that respect, which the Supreme Court has said is the same as wilful conduct as far as limitations of liability are concerned.

Then we come to Mr. Baumgartner's deposition. The meat of this case is really in the deposition. I might

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caution you that we have in the stipulation, agreed that you could look at Judge McLean's notes. Judge McLean, I do not believe, had the opportunity to read the depositions. Some of his notes may reflect the lack of the real meat of the case in that respect.

THE COURT: I could suggest that I put the thought of relying to any extent on Judge McLean's notes in this particular case off to the side. I will tell you that in other cases which I have had occasion to review, Judge McLean had very, very detailed notes on depositions and other things. I can recall one case where I advised counsel that he had some 200 pages of digest notes. That was not the case here.

MR. MALOOF: We had no way of knowing, but unfortunately I don't believe he had the opportunity to read the depositions, your Honor.

THE COURT: We have been working for some time now, and all of the material has been read or scanned. Some things you go through quicker than others, but I would suggest that Mr. Baumgartner's deposition is one which was read carefully. I think a point should be made here that since he did testify by deposition, I suppose I have the same opportunity to evaluate his credibility as Judge McLean would have had, and, of course, the Court of Appeals, should

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one or the other side here go up, have an equal opportunity--

MR. MALOOF: The only witness that I am sorry you didn't get to see was Captain deBouthillier, who I thought was an excellent witness. To discuss briefly Mr. Baumgartner whose duty it was to repair these ships, he admitted that he perused the log books and was looking for unusual appearances. He admitted some very interesting things. For example, that continuous pumping in one hold and not in others to him meant the ship was leaking. He testified that a leak can be found by the amount of water generated in a particular hold. He also admitted that continuous pumping in one hold and not in the others means the ship is leaking.

THE COURT: I think you are very close by this time, and I think you realize this, to proof of a failure by the ship owner to provide a seaworthy vessel.

Baumgartner, as the owner's representative, not only having had access to the logs, but having perused the logs, I think will probably get you over that threshhold. I think the big question will be whether you can get through the door.

MR. MALOOF: The whole thrust of my comments, your Honor, is to prove knowledge in the captain, in Baumgartner, in Mandle, that he had a seaworthy ship. I think

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your Honor's comment that I had the minimum to receive the package limitation means the ship has to have been unseaworthy, because that was the cause of the damage in this case, not as a pure negligence and storage, or anything, but an unseaworthy ship. A leaky ship. What did they know about it? An analysis of the cases cited by plaintiff in its several briefs, shows that knowledge is the important thing, the Wildomino, the Malcolm Baxter, the Royal Haven, in all those cases, it is knowledge, knowledge of an unseaworthy condition.

Then, you have an intervening deviation, the Courts will look to see, did they know about the possible deviation.

So knowledge, the mental state, is the important thing. That's why I dwell upon these comments under oath. This is the only way to prove knowledge. They are not about to come and admit to me that "I knew," although as a matter of fact they did, but they didn't mean to.

Mr. Baumgartner also admitted as follows: that the 18 inches of water at Baltimore should have been investigated, that this failure caused the cargo damage, and that the 18 inches of water was caused by the failure to investigate the entry of water in the number of three port billing on the prior voyage.

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Mr. Mandle, the operating engineer, could not account for the high readings on the Madras voyage, six months before. He said where number 3 is pumped much more than other holds, that is indicative of a problem in number 3. Mandle would have ordered an investigation, he said. If he had examined the logs as Baumgartner did and Mr. Balkunas did, Mr. Mandle said he would have ordered an investigation. If he had examined the logs and noticed the pumping in number 3, he would have taken action. He testified that one would "certainly want to pump it and observe the readings of 15 inches and 13 inches."

Of course, he disagrees with Mr. DeOrchis, who says since the billing is not filled up, real seamen don't worry about that. But we are talking about the operating engineer of the Weyerhaeuser Company, not some lawyer trying to win a case.

With reference to the readings of 12 inches and 18 inches in the number 3 port billing, while the Iligan cargo was being loaded at Baltimore, Mr. Mandle said the captain, knowing the readings, should consider that he has a considerable water entry.

He would have investigated the reason for recurring readings of water in the number 3 port billing in early June of 1966. To him the 24 inch readings during the coast-

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wise voyage, meant that there was water in the cargo, and that is excessive water. If he had known of the degree of water entry from Tampa to Cristobal, that's after they put aboard the fertilizer, he would have called in the American Bureau of Shipping and it is definitely possible, says he, that the cargo would have been removed from this ship. By the way, if there is any doubt, your Honor, that the continuous pumping is of extreme significance, it should be noted, and it is in the record, that on the voyage after these valves were repaired, while the ship sailed from the West Coast to the Far East, the billings were pumped once in one month.

We don't have a case where a ship owner just automatically pumped every day out of habit or out of fund. He was pumping because there was a problem, and he knew about it.

THE COURT: I am not sure if in a case like this that type of hindsight information isn't something like the repair to the stairs after the accident. I recognize what you are saying, but all of us are not benefited or gifted with the advantage of hindsight or whatever you want to call it. It seems to me that what you have to demonstrate here in this case to achieve your objective, is you have to demonstrate something very close to a wilful and wanton

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misconduct in order to get yourself to the unreasonable deviation plateau, which would give you recovery beyond the limitation.

Would you like to speak to that for a moment, because I think that that really is going to be the key part of this phase of the case.

MR. MALOOF: Yes, I will. I will skip a couple of other points and perhaps come back to them later.

THE COURT: You can take it in order, just as long as you receive this point.

MR. MALOOF: I did of course intend to mention that. Perhaps I can--because I have almost reached that particular point anyway, may I?

THE COURT: Of course.

MR. MALOOF: Plaintiff requests that your Honor give special consideration to the testimony of Captain deBouthillier, who is the only expert who testified in this case, because your Honor in his decision, is going to be dealing with the mental processes of people who are high in the shipping business. What did they know under certain circumstances. The plaintiff saw fit to bring to the courtroom an expert who has for thirty years been in the shipping business, and asked him to interpret the logs and to in his opinion as a man who had been a high shipping

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executive, advise the Court what did certain people know or what should they have known, unless they were guilty of gross negligence from the evidence that they had, and Captain deBouthillier did that. He testified that with the number 3 port billing taking water, as it was, the damage to the Iligan cargo was certain.

The normal and expected pitching of the vessel has to cause water from the number 3 to go into the number 2 hold right through the non-watertight bulkhead. He concluded solely with reference to the log books, that the vessel was experiencing a substantial and recurring problem with water entering the number 3 hold from an unknown source, that the problem began at least at the beginning of the Madras voyage, in June of 1966, and was definitely apparent on August 3 when the ship arrived at Madras.

Water continuously entered the number 3 hold from August 5 to September 6, as evidenced by the almost continuous pumping on every watch, which Captain deBouthillier said was a very unusual occurrence.

From his experience, and the study of the documents, he said there was no doubt in his mind that Captain Dumble knew that his ship leaked while it was in Baltimore. He had no doubt that Baumgartner and Balkunas, who was the port captain, having read the logs, knew there was a problem

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on the Madras voyage.

The important fact was the recurring water entry. The continuous pumping means that you are pumping it out and it keeps coming in. It has to be significant--

THE COURT: You see, this cuts two ways, because you had continuous pumping, this is what we were discussing a few moments ago, on the voyage from Madras to Portland, and at that time, and, as I say, at least the record would indicate that except possibly for storms the offending valve was about 15 feet above the waterline, which is a fairly good distance.

MR. MALOOF: It doesn't cut two ways. It moves there was an unknown entry of water. Unknown. I don't have to prove how it came in and I don't have to prove that they knew how it came in.

My case is that they didn't know how it came in and they didn't find out. That's the wilfullness of this case. That's what the French call dolus, insouciance, disregard for the consequences, gross negligence, and the Supreme Court says it is the same as wilfull conduct. That's my case.

It is the same thing under the Warsaw Convention and it is the same thing under the Carriage Of Goods By Sea Act. I don't have to crawl into the defendant's mind to prove he knew and hated this cargo and it was malicious and wanted it damaged.

But I haven't even come to that part of the case yet.

lhrf 2

By the way, Mr. DeOrchis had in the courtroom for the whole trial an expert witness named Captain William Wheeler. I know him. He is a very well respected man. So well respected, Captain Wheeler wasn't even put on the stand after he heard Captain deBouthillier testify.

THE COURT: I have heard Captain Wheeler testify on a number of occasions now at trial, and I think I know as much about his background now as I am going to know in the next two years, and under the circumstances, there may have been a number of reasons other than the one you ascribed to counsel for not putting Captain Wheeler on the stand, among others being that there was no jury in this case.

MR. MALOOF: Nevertheless, one of the reasons could have been that his testimony would have been adverse to New York Navigation's case.

Judge MacLean commented after the trial to Mr. Warner that Weyerhaeuser should put some witnesses on in this case, and he was amazed that Weyerhaeuser Company didn't do it. There are many people they did fail to produce, and if I might take the liberty, I don't think I really have to, it is in my brief, there are many people they didn't produce and the plaintiff does ask for the necessary inference from the failure to produce

lhrf 3

Mr. Balkunas, who read the logbooks, surveyors who saw the valve, people who inspected the valve, metallurgical people who weren't brought to the trial.

THE COURT: Weren't they equally available to you to take their deposition --

MR. MALOOF: I proved my case anyway. I don't have to prove their case --

THE COURT: I think it is what I have in the record here. I recognize the point that you make and it might be effective with a jury, but in a major case where a great deal is involved, where a lot of work was done, it would seem to me that the thorough counsel for the plaintiff could also take the depositions of these crucial people and might very well have made hay with them had he thought that they were useful. So it cuts two ways.

MR. MALOOF: It doesn't really, because they are not here. I have no power of subpoena over them in San Francisco.

THE COURT: No,no. I said by deposition.

MR. MALOOF: By deposition possibly.

THE COURT: The case was tried essentially in that regard. I assure you if you had gotten their depositions, it would have been something you could have done something with.

lhrf 4

MR. MALOOF: As I didn't have any trouble with the master and the other two either, I wouldn't have had any with Balkunas.

THE COURT: Fine. I have the point.

MR. MALOOF: There is only one point I want to make about New York Navigation's failure. He had in the courtroom the surveyor that he put aboard the ship in Baltimore and didn't put him on the stand, and then has the chutzpah to argue that he didn't know the ship was unseaworthy.

I want an inference that that surveyor said, "Don't put me on, I saw it leaking."

The mast fact therefor in this case, your Honor, is that Weyerhaeuser Company allowed this cargo to be loaded into a known unseaworthy ship and that unseaworthiness approximately caused the damage. Nothing proves this as much as the captain's comment to the new chief engineer at Baltimore that, "We had a lot of trouble."

This conduct makes the bill of lading null and void, makes him an insurer as at common law, no matter what name we give that conduct.

There are certain names we could give it. We could go for an analogy to the Warsaw Convention, though naturally it doesn't apply to this case because it applies

lhrf 5

to airplane accidents, but under the Warsaw Convention, if the owner of the airplane is guilty of wilfull misconduct, it doesn't have any limitation.

THE COURT: Except, let's be quite candid about it, in most of those cases your airplane crashes. I would analyze that type of a situation to that fateful final deviation where the ship goes to the bottom. Here your ship took water, no question their ship took water. But it didn't fail to reach its port. It did travel on the course apparently and at the speed intended on this particular voyage.

I have some problem taking this doctrine that you have presented to me of deviation, which is classic, and classically, of course, it represented a geographic departure from the same voyage, and I am pressing it on to this case in such a way that you will bypass or go over the COGSA limitations.

In most of those airplane cases you speak of, the ones I am thinking of, the plane crashes.

MR. MALOOF: I don't mean to bring the Warsaw Convention cases to the Carriage Of Goods By Sea case. I merely mean to take the definition of the wilfull misconduct and then to argue that this shipowner was guilty of wilfull misconduct and then to ask your Honor to hold

lhrf 6

that Congress did not intend that a carrier who is guilty of wilfull misconduct should have a limitation of $500 a package. That I think you might be able to do, certainly not anything to do about bringing over any airplane crash cases.

As a matter of fact, all I want to do from the cases in my brief, you will see that the definition of wilfull misconduct is a conscious intent to do or to omit doing an act from which harm results to another or an intentional omission of a manifest duty. There must be a realization of a probability of injury and a disregard for the probable consequences of such conduct.

I simply ask your Honor to take the definition and if you are able to apply it here to say that Weyerhaeuser at least could be called one guilty of wilfull misconduct as one step in my syllogism.

THE COURT: But you do concede that I must make a finding of wilfull or wanton conduct or misconduct in order for you to achieve the result you ulitmately seek.

MR. MALOOF: Or gross negligence, your Honor.

THE COURT: Aren't they analogous?

MR. MALOOF: Essentially the same. If you find gross negligence, I would request a decision as requested. Just one other point, one more comment, if you will excuse

lhrf 7

me, about wilfull misconduct.

The courts are quite clear that this does not mean that a defendant airline had a deliberate intention to kill a passenger or to wreck an airplane. In one of the cases in my memorandum, wilfull misconduct was simply a failure to perform a test, which failure was reckless rather than merely negligent. Then you could call this conduct a deviation from the contract of carriage. Deviations today certainly have gone far beyond the deviations in the mere geographical realm. I don't think I have to discuss that too long because there are many cases which hold that a simple wilfull or grossly negligent change in the risk which is not anticipated by the parties as a deviation, an unreasonable deviation, which will avoid the contract of carriage.

For example, unnecessarily entering a drydock with cargo on board, which increases the risk of damage to the cargo, stowage on deck without permission, there are many cases on that, over-carriage, delay, et cetera.

All of these types of conduct have been called unreasonable deviations which have displaced the contract of carriage and made the defendant insurers.

It is a material departure from or a change in the risk which was anticipated by the parties.

lhrf 8

THE COURT: I recognize there are these cases. For example where the risk is materially increased by stowage on deck rather than underdeck or proceeding in tow, I recognize that we do have that type of a situation.

However, I have been unable to find any case in my research to date which has held that unseaworthiness of the vessel per se, without a resulting geographic deviation or abandonment of the voyage, even when caused by wilfull misconduct of the carrier, can be considered a deviation going to the essence of the contract.

I have tried to study all the briefs that have been presented and go a little bit beyond what you gentlemen have done in an effort to find such a holding.

MR. MALOFF: I refer your Honor to the Wildomino case of the United States Supreme Court where the knowledge of the unseaworthiness of the ship before it left port was enough to strip her of all limitations in the contract. They just didn't call it a deviation.

You see, their problem, your Honor, was that there was another deviation on the same voyage. The ship left port in the Wildomino with an inadequate supply of coal. As a result of the inadequate supply of coal, she had to deviate.

While she was in this geographical deviation, she

lhrf 9

struck a reef and was lost or the cargo was damaged, I forget.

THE COURT: You had related to it for better or for worse this geographic deviation. She went off her course. She struck a hazard that she wouldn't have had she not deviated. I don't want to be too technical on this particular subject, but we are going on a somewhat uncharted course ourselves here, the way I read the cases. As I say, I may have missed something, but I can't seem to comeup with a case in all the years of maritime decisions which quite fits this one, and I don't feel your description of Wildomino really answers my problem.

MR. MALOOF: I am sure that if your Honor is not able to find a case exactly on all fours with this one, it will not inhibit you in arriving at the same theory as the Wildomino, and that's the case I tried to revolve around.

The Malcolm Baxter case is also important. It is the theories of these cases. The Malcolm Baxter case, the Supreme Court said unseaworthiness alone or deviation caused by it displays the contract of afreightment, only insofar as damage is caused by the unseaworthiness. That means this. If the deviation has not been foreseen, it becomes another causation for the loss, and the Court will

lhrf 10

not hold the carrier responsible for an initial unseaworthiness unless the carrier also knew that the deviation was possible. They don't bother to call it unseaworthiness deviation.

Perhaps it is my fault that I am trying to denominate it something. When I finish, I will finally come back to the hero of the case who is Judge Weinfeld who says, "Why call it anything? It is the conduct that ruins the contract."

THE FLYING CLIPPER which has finally, after all these years, been resurrected by the Circuit Court of Appeals in the Hong Kong Producer case and the MORMACVEGA which is not yet reported.

THE COURT: I have read MORMACVEGA, I am very familiar with it, and again that's a question of the containers on deck.

MR. MALOOF: In the Wildomino,the ship was sent to sea in an unseaworthy condition and the Court held that they had to deviate so then the deviation would have been anticipated so they had no limitations in a case like that.

In the Malcolm Baxter case, the BAXTER was ignorant of the unseaworthiness, no knowledge. It is not a question of calling the unseaworthiness a deviation.

lhrf 11

I think I perhaps have helped to confuse the matters by doing that. Let's just say known unseaworthiness. Let's not call it anything else. But if you don't know about it, you come under Malcolm Baxter and you still have the whole contract.

THE COURT: You do have to get over this hurdle. I think you have to show me that the master was fully aware of the specific defect causing what we will call unseaworthiness here and nevertheless took his ship to sea. You are asking me to draw certain inferences, and it has given me some pause, but I think that's really what it comes down to.

MR. MALOOF: I am afraid, your Honor, I am going to have to ask you to hold off to show any specific knowledge of a specific defect but simply that hold No. 2 was subject to a leak that was in hold No. 3, and that it had happened on two prior voyages, the captain knew it had to happen again, that it was progressive and that he knew this cargo had to be damaged. That's what I am going to prove, that has been proved, and I think that's enough.

THE COURT: He says he tasted water, he tasted fresh water.

MR. MALOOF: That was during the voyage. It had nothing to do --

lhrf 12

THE COURT: Let me go on.

The clapper valve would have introduced sea water, salt water, into the ship. As I recall, your sanitary system was a salt water system as well. Now you have a captain, for better or for worse, and I don't know how good this test is, he dips, he tastes, he tastes fresh water. I have some difficulty, if I can accept that, reaching the conclusion that the captain knew that the condiction which you say was the cause was in fact the cause.

Did he make up this business about the test?

MR. MALOOF: I think he made it up, but it isn't important whether he made it up or not. Let me respond to both of my own comments. He didn't say how he got the fresh water to taste. He couldn't get in that hold which was full of 3,000 tons of fertilizer. All he could taste was what was on the end of the dip stick, which had chalk on it. That is all he tasted, if he tasted anything. Number one.

Number two, the important state of his mind is Baltimore and times prior to Baltimore. What do we care what he tasted later at Panama? He let the ship go to sea in an unseaworthy condition at Baltimore. He didn't taste anything before Baltimore. It had nothing to do with the state of mind, what he tasted in Panama.

THE COURT: If he tasted salt water in Panama, he should have off-loaded your cargo at Cristobal.

MR. MALOOF: That's another argument of mine, that they could have minimized the loss. Let's stay with the one.

THE COURT: Up to Cristobal you have told me that he could have taken the cargo off and it would have been safe and sound.

MR. MALOOF: May have been. I don't have to prove it would have. I think it could have been minimized, at least. It arrived in the Philippines not even in specie, your Honor. So at least there is a minimizing argument.

THE COURT: I recognize the condition of a cargo when it was off-loaded.

MR. MALOOF: Those are two different arguments, Judge. If he hadn't sent it to sea at Baltimore, there wouldn't have been any damage at all. If he had told the plaintiff that his ship was leaking, the plaintiff wouldn't have put it on this ship. Mr. Best so testified. That had nothing to do with his taste test at Panama. His taste test may only apply to the minimizing of the damages argument of mine, not to the main case.

We can't have a retroactive state of mind.

THE COURT: It is probative of his state of

mind, the way I see it, whatever you want to say, and I don't like to put labels on things unduly either.

MR.MALOOF: What should be more probative is that Mr. Baumgartner, whom he said knew more about the ships than he did, said it couldn't be fresh water. That should have been more probative. Also what should have been more probative is that the water kept coming in even when he wasn't taking on fresh water, and he admitted that.

So all of these things, the fresh water, the captain being left off the sounding tubes, the sweat, these are all excuses. Captain deBouthillier thought nothing of it and the records do not sustain it. It's just the way of the captain trying to justify what was a horrible mistake.

To use the term deviation, which I am sorry I started with now, because I don't think we ought to call it anything, but the Wildomino line of cases and the Malcolm Baxter and those Supreme Court and Second Circuit cases make it clear in this case, not having any interveneing deviation, makes it clear and supports the proposition that to send the JOHN WEYERHAEUSER to sea in a known unseaworthy condition, which alone causes this damage, Judge, this case comes right under the Wildomino theory and the Malcolm Baxter. There is just no doubt in my mind. There

is no intervening deviation to worry about. The quote from the Malcolm Baxter is "Unseaworthiness alone or deviation caused by it displays the contract of afreightment only insofar as damage is caused by the unseaworthiness." That's this case.

The reason they say or deviation caused by it, that means the shipowner must also know that the deviation is foreseen too. It's kind of a restricted set of facts that those cases hold, but I think we can still use the theory here.

THE COURT: Would you comment briefly, if I may not take you out of context, on your claim that the statute is unconstitutional if interpreted to permit the wilfull disregard of the unseaworthiness of the vessel? Stay with that for a moment, if you could.

You make that point, I really don't feel that it is something that we should spend much time on, but I'd like your comment on it just briefly.

MR. MALOOF: Amendment 5 of the United States Constitution forbids the taking of a citizen's property without due process of law.

This is interpreted by the Supreme Court through the years that the taking of property must have some relation when you are interpreting a statute to something

which will not cause a basic unfavorable reaction, which you might say would be unfair or would offend the public conscience, which might be the case if you have something which is done which has no relation to the purpose for which that statute was passed.

In this case Section 45 was a package limitation which was passed to remedy a certain fact picture which had happened previous to 1936.

The carriers had been putting all forms of small limitations in contracts of carriage. I think even $25 a shipment had been held to be valid. The Carriage of Goods By Sea Act, being a compromise between shippers and carriers in this particular instance was meant to be a benefit to the cargo owner. It was a minimum limitation of $500 per package, below which any limitation would be invalid.

To interpret Section 45 now of giving that limitation to a carrier who is guilty of wilfull misconduct or gross negligence would be a violation or would be interpreting that part of the statute in a way which would be contrary to the raison d'etre, the raison that Congress passed it.

In that sense it would be taking plaintiff's property without process. It would have no relation to the raison it was passed. It would be in my opinion

like a tax on one citizen for the benefit of another citizen, with no public purpose.

THE COURT: If I find no wilfull disregard of the unseaworthiness of the vessel here, I suppose it wouldn't be necessary to consider that particular claim, that is that the statute is unconstitutional.

MR. MALOOF: If you so find, perhaps you would not.

THE COURT: I think I caused a deviation in your argument, and I apologize. You just go back on the track here and we will let you finish. I'd suggest that when you finish we will take a break to give our court reporter a chance to refresh himself.

MR.MALOOF: I again apologize for the detail. I thought it might be necessary. We are only doing it more for your benefit --

THE COURT: It is a major case and I feel that it is important that we have some of these exchanges so that I can be clear as to all phases of the proof and the legal positions taken by the parties.

MR. MALOOF: Then to wrap up the deviation point, your Honor, which ties into the Wildomino and Malcolm Baxer line of cases, I won't repeat all the cases because they are in my brief, aligning that law to this case where there is no intervening deviation, the proof is that the

defendant Weyerhaeuser knew that his ship was leaking, that the leak was becoming progressively worse in the No. 3 hold, and that damage to cargo placed in the No. 2 hold was certain to result. This is just as bead as cutting somebody else's -- cutting the head of somebody else's chicken with an ax.

If it is certain to happen, that's pretty certain. I could call it conduct of converse, I am not going to get into that, or an estoppel, because the plaintiff's man was right at Baltimore, he spoke to the man at Baltimore, he didn't tell him anything. If he told him it was leaking, he wouldn't have put his cargo aboard. It is a case of equitable estoppel. Judge Weinfeld held in the Flying Clipper case that it is not necessary to designate this kind of conduct in any particular way.

It is the conduct itself which displays the contract of carriage, as well as the provisions of the Carriage Of Goods By Sea Act which gives carriers the package limitation, Judge Weinfeld's theory being that if the contract falls, the Act has to fall because it only lives when there is a contract, by its own definition.

The case of Olivier Straw goods case is very important, your Honor, for some of the language. That is the Alaska Maru case which you may be familiar with.

Briefly the facts are that the bill of lading recited that the goods were on board but they were not on board and as a matter of fact they were destroyed in a warehouse by an earthquake on land. The Second Circuit Court of Appeals discussed estoppel for a little bit in the opinion and then went into some language which I think might be very helpful to your Honor.

They call the statement that the goods were on board a warranty. They say the warranty that the goods were on board was broken by the failure to ship them, and that breach under the authorities deprived the carrier of the right to invoke the clauses limiting liability. They again in that case refused to categorize it in any special way. They mentioned estoppel and they mentioned warranty, but they just go by the conduct. What was done. What was said.

The plaintiff in New York relied on this bill of lading. You erroneously issued it into commerce. You can't take any limitations in a case like this. It's almost as if you didn't have to explain it. What we do learn from it is that any wilfull act, wilfull failure, failure due to gross negligence, failure to perform a manifest duty which increases the risk in a way not contemplated by the parties displaces the contract, it is

a fundamental breach, it goes to the root of the contract.

If we had known they were going to put a cargo into this ship which leaked, believe me, your Honor, there would have been no contract. If we knew the ship leaked, we would have a right to avoid the contract. That's the key whether there is any limitation.

Could we have avoided it if we knew? The case against New York Navigation proceeds on some --

THE COURT: Let me stay with that just for a moment. My recollection is that the various equipment for this steel mill in the Philippines was actually transported out there not in just one shipment aboard the JOHN WEYERHAEUSER, but, as I recall, there were several shipments of this rather substantial steel mill equipment. Isn't that true?

MR. MALOOF: That's true, your Honor. This was one ship where several were contemplated because it was a 60 million dollar steel mill.

THE COURT: Exactly. The agreement, of course, that you say was breached in toto, which was entered into some months before in July of 1966 actually covered the entire series of shipments. It wasn't a single contract relative to one shipment on one voyage, one ship. I find it very difficult to consider the breach here to give rise to

anything but damages in the context of this particular case where, as I say, you have this master contract, one single document, which covers a number of shipments, one of which did not go through, two million dollars worth of, say, 60 million dollars worth of equipment. So far as I know the remaining equipment which was transported out there got there safely and everybody was happy with the contract. I do not see the contract falling here by virtue of this occurrence, although I would certainly be prepared to call it a breach of contract. The sea the breach could, would and should give rise to plaintiff's claim for damages rather than to vitiate the agreement between the parties.

MR. MALOOF: Would your Honor call that a fundamental breach of contract?

THE COURT: No, I wouldn't. If they didn't supply any vessels, if they didn't take any of the stuff out, I think then you get to the essential or fundamental breach.

MR. MALOOF: Plaintiff suggests that your Honor consider this several contracts because the contract had to have a bill of lading and it had to have several bills of lading. You had to look at the contract and the bill of lading both because the consistent parts of the bill of lading were a part of the contract of July 11th by agreement.

Since there were going to be several different bills of lading, then it goes in stages and the plaintiff had a right to reject one of those contracts if the ship was grossly unseaworthy, as this one was.

Otherwise, the result would be most unfair.

THE COURT: I don't see where it would be unfair if the breach of the contract gave rise to a claim for damages.

MR. MALOOF: It is unfair, your Honor, because the parties contracted for certain warranties in this case. There was an express warranty to provide a suitable and seaworthy ship. There also was an implied warranty granted by law to every contract of afreightment. Both of those warranties live together.

Unless the express warranty clearly is inconsistent with the implied, they must be interpreted as being consistent and cumulative. The express warranty is interpreted strictly. What was that warranty by New York Navigation? That warranty was to provide seaworthy ships.

The JOHN WEYERHAEUSER was provided on December 11th. If that ship was seaworthy at that time, the express warranty would have been satisfied. If she became unseaworthy the next day, it would have been a case for damages, not for a breach of a warranty.

But the implied warranty as of the day the

ship sailed, not having been taken up by the express warranty, which even for Mr. DeOrchis's own brief where he cites cargo, the express warranty only supersedes the implied warranty, so far as it extends, so far as it extends, it says.

Mr. DeOrchis has failed to read further or to analyze that quote. Inasmuch as they are not inconsistent, there are two warranties that New York Navigation violated, and I disagree with your Honor if you hold that this is not a fundamental breach of this contract.

If I have a warranty for a seaworthy ship, I don't want $500 per package, and the courts wouldn't make me take it, because it makes the contract null and void.

Now you say I can't knock this whole contract out because there are many different ships. I think the law has more imagination than that. I think this is several contracts. One bill of lading on to this agreement, another bill of lading on to this agreement, and I can certainly refuse to put my cargo on any ship that leaks, into that one hold. That's why it is a fundamental breach, because I have that power, and nobody can sue me for not doing it.

THE COURT: Are you telling me that every time a shipper shipped cargo and the cargo was damaged by a leak, if the shipper could demonstrate that the leak had

been in existence prior to the date he put his cargo on board, he could always recover without any limitation which, for example, would be contained in the bill of lading?

MR. MALOOF: I don't say that, your Honor. But if the carrier knows it is leaking -- let's limit it to the facts of this case -- for six months, two voyages, fails to find out the cause of the leak, fails to repair it, I say in this case there is no limitation. Why should we discuss other cases?

THE COURT: Then you are saying, really, there is no limitation if there is gross negligence or wilfull or wanton misconduct. I think it would be implied from that that absent a finding gross negligence or wilfull and wanton misconduct, the underlying limitation would subsist for contract purposes as well as what I will now classify as our deviation discussion which took place a few moments ago. I think I have to come back, to find for you, no matter how we slice the apple, from which side we begin with the knife, I think to find for you all the way I must make a finding of gross negligence or wilfull and wanton misconduct.

MR. MALOOF: Not against New York Navigation, which gave an absolute warranty of seaworthiness, which doesn't depend on knwoeldge. As against Weyerhaeuser, I

suggest to your Honor that the knowledge of the unseaworthy ship is quite sufficient. Gross negligence just screams in this case. This is gross negligence, if I ever heard of any or I wouldn't have gone to all this trouble.

Does your Honor have any other questions?

THE COURT: I think not. I think you have covered your subject very well, I think I have tried to indicate some of the problems as I have come to grips with them and am continuing to come to grips with them. I would suggest, unless there is something more you want to say, we might take a short recess to give our court reporter a chance to stretch his legs and flex his fingers, and then we would hear from Mr. DeOrchis and Mr. Warner.

MR. MALOOF: If I can just have one minute, and then I certainly agree that the reporter can have a rest. The things I didn't say about New York Navigation I can reserve for rebuttal, because I think I have been talking fairly long.

THE COURT: I think I am partly responsible for that. To the extent that I caused you, as I said, to deviate, I would suggest that at the end, if there are a few things you would like to hammer home, I will try to give you a few minutes at the end.

MR. MALOOF: I just have one comment from a

very interesting English case, it is a nonmarine case but a fundamental breach is a fundamental breach.

As a matter of fact, this case does recite an English case and follows it. He talks about the case where an innocent party can consider the contract null and void. Then he says, "If the innocent party on getting to know of the breach does not accept it but keeps the contract in being," which would be the main contract in our case, "Then it is a matter of construction whether the guilty party can rely on the exception or limitation clause."

He goes on and he says, "The courts may reject as a matter of construct even the widest exemption clause if it would lead to an absurdity or because it would defeat the main object of the contract. Perhaps for other reasons, and where some limit must be read into the clause, it is generally reasonable to draw the line at fundamental breaches."

THE COURT: When Iligan learned of this considerable damage to its cargo, did they take any steps to terminate the agreement of July 11, 1966 or did they continue to ship subsequent steel mill components out to the Philippines under this agreement?

MR. MALOOF: I believe it was continued. There is nothing in the record, but I have the feeling from

preparing the case that it was continued.

THE COURT: I would have thought so. I didn't find anything in the record either, and it is really a comment that I make almost in the form of an aside which may help to demonstrate my being troubled in finding that the agreement itself was considered to be vitiated by this damage, very serious and severe damage to this one major shipment of cargo.

Is there anything else you would like to say before we take the recess?

MR. MALOOF: On that one point, just a feeling this might have been a unique ship and that perhaps this case would have taught them to be more careful perhaps in the future and they would perhaps have kept the contract. They may have had a right to cancel the entire contract if they had wanted to, fundamental breach of the entire contract. Thank you, your Honor.

THE COURT: Thank you, Mr. Maloof. We will take a short recess.

(Recess.)

THE COURT: I guess, Mr. Warner, you will be getting up first the way we set it, and Mr. DeOrchis second. Have I missed something, or is that a switch?

MR. WARNER: That is the way it was agreed, your Honor.

THE COURT: Mr. Warner, we will hear from you on behalf of defendant Weyerhaeuser.

MR. WARNER: May it please the Court, as I understand Mr. Maloof's submission, he maintains that the JOHN WEYERHAEUSER had been leaking in Madras, leaked across the Pacific, it leaked down the West Coast of the United States while carring a cargo of lumber, it leaked up the East Coast of the United States to its discharge ports.

He submits that it was leaking while it was in Baltimore prior to and during the loading of the cargo that he is interested in in No. 3, and he claims that it was leaking in Tampa and then again that it was leaking in Cristobal in the Canal Zone.

It is my submission that Weyerhaeuser throughout exercised due diligence to make the vessel seaworthy. They tried as best they could. The JOHN WEYERHAEUSER at the time we are talking about was about 22 years of age. Five or six years before the time we are talking about Weyerhaeuser tad taken the ship out of service and

spent a very substantial amount of money on it, very close to one million dollars, to be completely rehabilitated. The living quarters had been air conditioned, everything had been checked out. Let's start with Madras.

The cargo was not wetted in Madras. That was the subject of a lawsuit in this court. It was settled on a nuisance basis. There was no evidence of any water in the cargo that was discharged in Madras.

There were references to the action in the record of this trial.

THE COURT: Let me stay with that for just a moment. There were two things there that I seem to recall. You might comment on them if you would.

One, I have a distinct recollection and the record here reflects that at that discharge at Madras, it was necessary to chop out some of the cargo which had solidified and also I noted the time of the stopover in Madras, which was something to the order of 30 days, which at least from my own observation of the situation would not have been the usual duration of a stopover in a port such as Madras. I could understand this in a home port but I did notice that and if there is something in the record that I have missed on this which will be germane, I would like you to comment on it, the two points, the chopped out

cargo and the rather lengthy stopover in Madras.

MR. WARNER: As my recollection of the record, It is that because of religious belief in India and a dislike of fertilizer, the difficulty in obtaining labor, and when they did get labor, it would not turn out the cargo, move the gonnage, that is the principal reason why the vessel lay there for 30 days.

Secondly, because they were laying about so long and the weather there being humid, the fertilizer, the cargo absorbed the humidity and that caused it to cake and eventually they had to chop it out.

THE COURT: Let me just ask you this. Are those facts to which you have just made reference reflected within the record which I have before me?

MR. WARNER: Indirectly in the sense that there has been a reference made to the case that was in this court and all of the depositions, all the testimony relating to that, the cargo involved at the Madras discharge are in there. It has been referred to in the record. Rather the civil number is in the record.

THE COURT: However, that case, I believe you said, was settled for nuisance value so it wouldn't be that I have a decision as to which I could take judicial notice. And I would assume from what I have seen that

the depositions which may have been filed in the clerk's office in this court in that case, which was settled, then were not marked or deemed marked in evidence in this case.

MR. WARNER: That is correct, sir.

THE COURT: So really, I suppose I can't go beyond the raw facts and at least for the purpose of the decision make findings relative to what you have just said. However, I would suggest that what I will and should do is to determine whether there is anything in the record here which would affirmatively demonstrate that there had been sufficient leakage enroute to Madras to have caused the cargo to have solidified.

I will make one comment for what it is worth. The leakage on the voyage with which we are concerned caused this type of cargo, this fertilizer to slurry, to turn into a mud or a semi-liquid and run into the other cargo, whereas in your other case, at least we know this much, the fertilizer appears to have been in quite a different condition, to wit, in a hardened or solidified state. I leave it at that because I certainly do not intend to bring into the record something which is not solidly before us in the terms of testimony, depositions which have been marked as exhibits or read into evidence in this case.

I asked the question, I appreciate very much your answering it. I shall not make any findings relative to the answer which you have just made so that Mr. Maloof need not be concerned in that regard.

MR. MALOOF: I am not concerned about that point at all, your Honor.

THE COURT: You may proceed.

MR. WARNER: Next, your Honor, is the Transpacific crossing. There has been argument here this afternoon that the vessel was leaking, the pumps were running continuously. In the exhibit that has been prepared by Mr. Maloof's expert, Captain deBouthillier. I just glanced at it this afternoon, your Honor. I think it's perfectly obvious, and that is picked up from the logbooks of the JOHN WEYERHAEUSER. It's perfectly obvious because of the weather they are encountering in crossing the Pacific that they had literally, actually put seawater into the cargo compartments so the vessel would ride deeply in the water.

In other words, they ballasted her.

THE COURT: This is on the return light from Madras to Portland?

MR. WARNER: Yes. She was not carrying cargo, so she wouldn't be blown all over like a shell or something

on the surface of the water. They put water into the cargo compartments to weigh her down and there is a recitation of that in that very exhibit that's been prepared by his expert.

THE COURT: Well, there is an indication to me at least that hold No. 1 and hold No. 4 contained ballast, the nature and extent of the ballast at the moment is not in front of me, whether it was water or some other material is not completely clear to me.

You are indicating to me that there was water taken aboard and utilized as ballast.

MR. WARNER: There is a further entry that they were washing down the cargo compartments with fresh water, cleaning them out. Obviously if they put water into the cargo compartments, they have to pump them out.

THE COURT: I can note that on the 9th of September, some three days, two days out of Madras, they were washing the forward cargo holds.

However, I would indicate to you that the pumping out process which was reported as having taken place at least in part on the 9th, pumping continued on the 11th, 12th and the 13th of September, 1966 and then ballast was actually pumped out, I guess the weather got a little bit better on the 15th. I am noting on the 17th there was pumping, on

the 18th there was a pumping out of ballast. Maybe some additional pumping. And continuing along, I see the entries.

I assume there is no difference between counsel relative to the accuracy of these entries, that they were, in fact, taken verbatim from the,I guess it would be the engineering log.

MR. WARNER: Your Honor, I think a different construction might be put on. Mr. Maloof has suggested where it says they are pumping bilges, this was a continuous operation. I submit they made an entry on the engine log that they pumped bilges. They don't have the duration of the pumping. They did it on the 8:00 to 12:00 watch, the 12:00 to 4:00 watch and they don't usually put down they pumped for five minutes or ten minutes. They just make an entry, pumped bilges.

His construction of it, his interpretation of the entry and mine is different.

The next --

THE COURT: Let's stay with that for a moment. You say different. I am looking down the pumping notation and I see frequent indications of the time the pumps were in operation. For example, I will just take the No. 3.

Look, for example, and I merely am taking one example. Look, for example, to October 5, 1966.

The entry reads: "Pump No. 3, P/S" -- that may mean port and starboard --"12/4 P.M."

To me that would appear to indicate that the pumping operation commenced at or about noon and ended at or about 4:00, or took place during a watch which was on from 12:00 to 4:00.

MR. WARNER: The Court's second construction. During the 12:00 to 4:00 watch the bilge pumps were started and the drag was taken on No. 3 port and starboard, but it does not mean that the moment they came down at 12:00 o'clock, they started the pumps and ran it nonstop until 4:00 o'clock. It's merely an entry by which the chap said, I pumped the bilges from 4:00 on without any duration of time.

THE COURT: In the normal course, and I think I can take some note of what is normal practice at sea, is to note activities which occurred during the watch. During the period of that watch. And I do know, gentlemen, that those time periods, as they go along, seem to equate two different watches which appear to be four-hour watches for the most part.

So I would be willing to assume that pumping activity occurred during that watch period. Not that it occurred from the beginning of the watch to the end of the

watch.

I think that's a fair inference to be drawn from the exhibit.

Sorry if I interrupted you.

MR. WARNER: The next episode in the JOHN WEYERHAEUSER is at Portland, Oregon. She came in there. The American Bureau of Shipping came down, went through her for her annual survey.

United States Coast Guard was there for her annual inspection. The shore staff of Weyerhaeuser was there, Mr. Baumgartner was there and they went through the ship exercising due diligence to see what was wrong.

Numerous, many repairs were carried out. The replacement of a valve such as has been the subject of this lawsuit, it's a cheap, inexpensive job. They were taking out pumps, they were doing this and that.

What I am suggesting to the Court is that Weyerhaeuser had run this ship not quite like a yacht but had been spending money on it. It was not, they were not stretching things and doing a bailing wire job. It was being run in a first class condition.

THE COURT: I will note that I have examined the photograph and was quite surprised the first time I saw the exterior photographs of the vessel. The superstructure,

the stack and the other outward appearances of the vessel appear to me to be considerably changed from the type vessel, as I remember its construction, so that it would appear that there was money spent which made the exterior look quite different than originally.

May I inquire in this regard. You said that there was about a million dollar overhaul carried out not too long before the voyage where we have the problem here. I've not found any indication that the offending valve, clapper valve and related portions, were replaced at that time.

MR. WARNER: There is nothing in the record.

THE COURT: I don't find any clear indication that the clapper valve was visually inspected at that time. I know there is some other information in the record and I note the location of the clapper valve.

Can you point to any clear indication anywhere that the clapper valve and the immediately adjacent piping were visually inspected during that million dollar overhaul?

MR. WARNER: There is nothing in the record. There may be a categorical reference by Mr. Baumgartner that they went through everything, renewed the piping whereever it was necessary, but this particular valve, there is nothing in the record that we can anchor it right on to.

THE COURT: Lastly, Mr. Malcof makes the point

that the corrosion here, the rusting through of a rather heavy piece of metal could only have taken place, he says, over a very lengthy period of time. I don't think he really ever specified months or years but I wonder if you would just comment on that briefly.

MR. WARNER: Your Honor, I think the testimony of one of his experts, a year and a half ago -- it's my recollection one of his experts said he looked, and I think the Court has the photographs, and the expert had looked at the valve when it had been cut into four pieces and he said that all of the metal, with the exception in this particular area, was in first class condition.

Now, it would be sheer speculation on anyone's part to say how long this deterioration process did take, but he did say that the remaining metal in the -- except for this one flaw, which I think in Japan they found and found to be a quarter of an inch by an inch and a half, and with the exception of that the metal was sound, but I don't recall any testimony as to how long it would take to bring about the opening that finally did develop.

All of the witnesses testified, Mr. Maloof's witnesses, our witnesses testified that the classical way of determining whether or not a pipe or a valve is leaking is to look, the same as we do in our homes. If there is a

pipe leaking here, the paint will be stained. You can see it is running down. Everyone that went on board the vessel at Portland, the valve was in an open place. It was hanging on the side of the vessel where it would be easily observed up high and if there were any leaking coming out of it, it would have stained the skin, the side of the vessel, and it wasn't noticed at Portland with all the pros on board, American Bureau of Shipping, they were down there to classify the vessel, was she in conformance with their standards, was she going to remain A-1 Maltese Cross.

The United States Coast Guard was down there. They were interested in the watertight integrity of the vessel. They looked, saw no indication of it. Our own people looked, they saw no indication of any leak.

THE COURT: Well, you know, the sides of a vessel, particularly a cargo-carrying vessel, are not always quite as clean as the walls of our homes, and whereas I'm sure if a pipe were leaking in your house, you could see the effect of that on a well, I have some reservations, frankly, in port, whether you could see the resulting condition from a visual inspection.

My recollection is that this clapper valve was up some 22 feet, I believe, from the deck surface in what normally would be an unlighted area of the ship.

MR. WARNER: May I correct you, your Honor.

When the hatches are open, it's daylight down there, wide open. They can see and they were working cargo and they had the thing open.

THE COURT: Well, I guess that's a matter of how bright it might be. You can get into the wings of the ship even with the hatches open, I have been in situations where you can't see too much even with the hatch wide open to the sky.

This valve, as I recall it, is off to the side of the ship very close to the outer skin which might be likened to a corner of a room with the hatch opening not being directly over it but I'm not going to quibble about that. I don't think it's really vital to the case. I am trying to put myself back into the situation of the inspection taking place when the vessel returned to Portland. What was observable, what in fact was observed.

MR. WARNER: May I submit, your Honor, that if the valve had been leaking at that time, considering that the sanitary lines from numerous bathing and toilet facilities were hooked up to it, that would have been dumping itself down the side of the vessel, plus the aroma that you get with sewage and none of that was observed.

THE COURT: Was the crew on board during inspection

or had they been given leave?

MR. WARNER: No. The crew was on board. The same situation prevailed -- the vessel was still in operation. The same situation prevailed in Baltimore. The same situation prevailed in Tampa. There was no sewage, no smell of sewage any place.

THE COURT: If I may just interrupt once more. I am trying to visualize this. I can appreciate, again, how your house would smell, particularly in this day of these very nice room fresheners, but I am trying to put myself down there in the hold of a ship which carried fertilizer. Despite the washing down that may have been done, I am not quite sure that the human nose would be able to distinguish between the residue of cargo that had been in there for some months and the smell of some leakage from the sanitary lines.

MR. WARNER: Your Honor, I submit that if that valve had been leaking, and this is the skin of the ship and that's the valve up there, there would have been water pouring down the side of the vessel. And there wasn't any observed.

There are people on board that were trained observers. They are on to find out if the vessel's integrity was there, in Portland. The same thing was true in

Baltimore. The same thing is true in Tampa. But I am getting out of my chronological order.

Great emphasis has been placed on the pumping of bilges, carrying a lumber cargo. What lumber? The lumber is brought in, the Pacific northwest, it's raining all the time, it's rough, crude lumber. It's carried on deck and carried underneath and it dries, the water pours out of it. It goes down and is pumped out of the bilges. We are going from a cold climate into the Canal Zone, back out again and you have sweat. Lots of sweat. It's not at all unusual. There is no effort made to ventilate lumber, whether it gets wet or what happens to it doesn't matter.

There is no air conditioning there or any of these sophisticated systems they have in modern vessels to take care of cargoes so they won't be damaged by water.

Another factor we must bear in mind. 2 and 3 were now common and there was only one bilge system for No. 2 and No. 3.

THE COURT: Where lumber was carried,there was no bulkhead between them?

MR. WARNER: During the voyage in question, the bulkhead that was put up was not watertight.

THE COURT: It was temporary canvas.

MR. WARNER: The reason for taking out this bulkhead

there was so they could put in long pieces of lumber and the drainage from No. 2 flowed into No. 3, into the after end of No. 3, and eventually, No. 3, port and starboard, and was pumped out from there.

The bilges from the after end of No. 2 had been removed during the conversion we have been discussing earlier today. So here we have sweat, wet lumber, pumping of bilges. Nothing unusal. Run of the mill.

One other factor, the vessel was 22 years of age and there is testimony to the effect and there are documents that these vessels were suspect. Cargo underwriters wanted a premium to insure vessels for cargo carried in vessels of the ugly duckling, the Liberty class, because they were older.

However, because of the reputation, because of the status of the Weyerhaeuser fleet, they didn't have to pay the 10 or 20 per cent surcharge if the cargo were carried in the Weyerhaeuser vessels. That's set forth in the document the Court was looking at earlier today. I think it's Exhibit 4, the agreement between New York Nav and the plaintiff.

I have already touched upon getting around to Baltimore. Again, New York Nav sends down its inspectors. Its surveyors. We have our people there. They go crawling through the vessel. There is no indication, no

sign of any leakage. There is no smell, no one says anything. The vessel is cleared.

Of course, then we come to this critical part, 18 inches of water in No. 3 while in Baltimore. Unfortunately for plaintiff but fortunately for the defendant there are very clear unambiguous entries in the deck log. It snowed there and the longshoremen had difficulty in getting the hatches closed. In fact, they couldn't get one closed. Prior to that time there will be no water in No. 3. The hatch side open, the snow goes in there and it melts so they had to pump it out.

Now we go down the coast to Tampa. Again --

THE COURT: Let's stay with that a moment. Your No. 3 soundings beginning in Baltimore on the 12 of December, taking No. 3, I see port and starboard are both zero. The same for the 13th. The 14th goes up to 12, which is rather drastic, in No. 3. Up to 18 on the 15th, 16th and -- it's on the port side, I guess. Up to 18 inches. Then it drops considerably after that.

Does the log or record in this case reflect when it snowed in Baltimore?

MR. WARNER: There are the deck log and express entries to the effect that the longshoremen, the carpenters were not able to get the hatches covered.

THE COURT: On what date?

MR. WARNER: On the dates set forth in our brief.

THE COURT: I had a recollection as to that. I just wanted something to tie it together. As a matter of fact, I would note for the record that the same situation appears to have been noted in the No. 5 hatch on the afternoon of the 16th and on the 17th of December. If I remember it, the No. 5 hatch is aft and separated from the forward hatches by the engine structure.

MR. WARNER: No. 5 and No. 4, then the engine structure and then 3, 2, 1 on the foredeck.

THE COURT: It would seem that there is a fair amount of water in the port bilges, in the No. 5 hold at about the same time, and you are saying that that resulted from the --

MR. WARNER: Working of the hatches during a snowstorm in Baltimore I am also suggesting to the Court because they were putting in cargo during a snowstorm, the cargo itself is covered with snow. When it got inside the vessel, in time that melted and that drained, too, down to the bilges.

The next stop, coming down the coast, is Tampa. In Tampa Mr. DeOrchis' clients arranged for another surveyor to come down and my recollection of the testimony is he ame down, he looked at the compartment, he wasn't happy with

it and he told them they had to clean it some more and he went away and came back again. He told them to do something else, clean this, do that. He was down there, if my recollection is right, at least three and possibly four times.

And the critical thing is that in the after end of No. 3, where the grating or the grid, call it what you will, to get into the bilge itself is perforated. They covered that with burlap and this is where all the drainage would go and he went and looked at it and he touched it. That was his testimony. He was one of the few live witnesses we had in this case and he said it was bone dry. This is in Tampa now. We say this is due diligence. It's our best college try.

We now take the vessel and we get down to the Canal Zone. Incidentally, throughout the captain has testified that he had difficulty with No. 3 when he was taking fresh water and he discussed it with his chief engineer and he couldn't understand whether they were fooling around with the manifold, with the piping in the engine room and shoving some of the fresh water into the No. 3 and when he was in Cristobal and he got water in No. 3, went out there and he put the rod down and he dunked it a couple of times in the bilges and pulled it up and tasted it and it was fresh water and he went down and had another word with the

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chief engineer.

He said, what are you doing, which way are you turning the valves? He was persuaded he had fresh water which he only got when he was taking on fresh water. He was persuaded there was nothing wrong with the integrity of the vessel. That makes sense. Who would knowingly, wilfully start across the North Pacific in wintertime, in January and February, if he had the slightest idea that his vessel was -- that the hull was not tight. It just doesn't make sense. It's rough out there, no two ways about it.

Now, while he was there he had ample time, if he had had any suspicion -- he had some problems with his engine, that was repaired, Weyerhaeuser would get this, American Bureau was there. If he had the slightest idea. He didn't convey it, he didn't request any assistance. He had American Bureau on board the vessel every day. He could have said this should be done and that should be done. Nothing was done. It wouldn't have been necessary to pull the cargo out. All they had to do is put a plate on the thing on the outside, if he had any idea what it was. He could have welded it right on and used the other one. Not a big job.

Getting now to the -- I say that we tried

our best, as the Court has pointed out. We offered the package limitation before suit was brought, we offered it. After suit was brought we offered it. We offered it time and again. And it's been rejected and I suggest that if the Court does find, as it indicated it will, that we didn't exercise du diligence and the package limitation is available, I suggest the Court exercise its discretion not to grant plaintiff interest, but we will go on. I have a further point here --

THE COURT: Let me sopt with that. Let me dispose of that right away, the matter of interest, so there will be no question.

I may have offered it but I had the use of the money and whatever finding I make, I will tell you right now, I think fairness requires that them as had the use of the money have to pay for it and there would be a ruling from this Court that there be interest because you could, as you so well know under Admirality Rules 24 and 25, make a tender of payment into Court. We could have had the money here in the depository of the Court. It would have been invested and whatever monies then would have been available at the end, they would have gone over to the plaintiff.

So I will say to you so you need not waste too much time on this that I think firness would dictate that any award here would include interest.

MR. WARNER: We pleaded two limitations, the package limitation and then secondarily we have the shipowner's limitation, your Honor. We didn't before Judge MacLean, we didn't go into that because it may be moot if the Court decides that the package limitation is applicable.

If the Court decides that it is not, and it is going beyond that, then we ask for leave to come in and show the value of the WEYERHAEUSER and the pending freight, which would be a short --

THE COURT: I presently incline in the direction of the package limitation. That doesn't mean I have made up my mind, but I want to be as candid with all of you as I possibly can, having had the advantage which Judge MacLean did not have of some time in which to read the record and give some thought and attention to the matters at hand. I recognize your point. I don't think you need dwell on it too long.

If you want to comment briefly, you can.

MR. WARNER: I think that insofar as the cargoes claim against Weyerhaeuser, that's my argument. Now I have to deal with, we had no cross-claim against New York Nav but they have a cross-claim against us and they asked for full indemnity including if they are held liable to cargo, that we reimburse them in full, and it is true as they

say in their brief that they tendered the defense of this case to us and Messrs. Haight on two occasions now have succeeded when they have been the owner and I have been the charterer in getting very substantial legal fees and so I was aware of what the law was, but in view of this Exhibit 4, the agreement, it's a little broader than our charter party. It could be construed to be broader.

Accordingly, we would not take over, that the only contract out was the charter party, we have taken over the defense. We told them that repeatedly. So I submit to the Court that they are not entitled to legal fees because plaintiff was suing not just on the bill of lien, which is under our charter party, but also has been urgently urging here that they are entitled to recovery on this agreement and we are not a party to this agreement, Exhibit 4. We have nothing to do with that.

And that introduced a new ingredient and it was for that reason, when the defense was tendered to us, we wouldn't take it. Simultaneously, we kept saying we will pay the package limitation and so I submit to the Court that New York Navigation is not entitled to legal fees from us if they should walk away.

I won't dwell on the --

THE COURT: Let's stay with that for a moment before

you leave it.

Do you have any more on legal fees before I ask my question?

MR. WARNER: I will be glad to answer your question.

THE COURT: All right. I would like to know, relative to legal fees, your position on this question which is basically what was Weyerhaeuser's undertaking? Was it to defend any claim arising from unseaworthiness or any claim arising from the lack of diligence only?

I will ask the same question of Mr. DeOrchis, so he better be thinking about it also because that's one thing that concerns me vis a vis you two gentlemen.

MR. WARNER: This full indemnity on charter parties first came down in the Scautroll case by Judge Weinfeld and Mr. DeOrchis' partner Mr. Poor who recently passed away, and Mr. Poor represented the shipowner and I represented the charterer. It's about four, five years ago. And in that case Judge Weinfeld decided that I, the time charterer, because we hadn't stowed the cargo properly, would have to indemnify the shipowner, the owners of the Scautroll for legal fees in defending the action by cargo.

We didn't appeal that. We paid the thirty some thousand dollars and that was the end of that one. So

then we tried another one, again Mr. DeOrchis and I before Judge Bonsal and that was the FARLAND. Again I was the charterer. Mr. DeOrchis was the owner and again, Judge Bonsal found that we hadn't stowed the cargo properly and that he awarded Mr. DeOrchis legal fees and this time we went up to the Court of Appeals and Judge Friendly went into it, Chief Judge Friendly at that time, and he put the imprimature of the Court of Appeals for the Second Circuit on legal fees in a matter of this sort.

Rather briefly, he didn't set forth the reasoning. He just said, that's it. So we paid again. On this one we knew all about. When this one came along, now I'm the owner and he is the charterer and he says, well, your ship was leaking, one thing or another, you should defend.

Well, if we are just the charterer, the time charterer, which is really a voyage charter here, we would have picked up the case and defended it, but he had this additional ingredient. He had this Exhibit 4, which we are not a party to. And it was difficult to separate them. And that is why we did not take over the complete defense and let him walk away. I don't know that that answered your question.

THE COURT: Not completely. I have a certain amount of background and you have now indicated, of course, the

fact that you were not a party to the contract. I just would like to focus in, as I did try a moment ago, on the concept. If I can have your position whether you undertook to defend any claim arising from unseaworthiness, or trying to classify these things, any claim arising from lack of due diligence only, looking really for the breadth of your undertaking.

MR. WARNER: Your Honor, I would like to read, the only way to answer this is to go to the time charter. I think it's in paragraph 8.

THE COURT: I have the time charter in front of me and let me turn with you. It's Exhibit E-2, is that correct?

MR. WARNER: Yes.

THE COURT: Entitled "Time Charter," up at the top.

MR. WARNER: 7th of September, 1966. In paragraph 8 it reads --

THE COURT: Line 76, right?

MR. WARNER: Right.

That "The Captain shall prosecute his voyages with utmost dispatch and shall render all customary assistance to ship's crew and boats. The Captain (although appointed by the owners), shall be under the orders and directions of the charterers as regards employment and agent; and

charterers are to load, stow and trim and discharge the cargo at their expense under the supervision of the Captain who is to sign bills for cargoes presented in conformity with mate's or tally clerk's receipts, and then typed in without prejudice to this charter party."

There is one further paragraph, namely down on line 151.

THE COURT: Paragraph 24?

MR. WARNER: Yes, your Honor.

THE COURT: Do you want to read that into the record?

MR. WARNER: Yes. "It is also mutually agreed that this charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of the Congress of the United States approved on the 13th day of February, 1893, and entitled An Act Relating To Navigation Of Vessels," et cetera, "In respect of all cargo shipped under this charter to or from the United States of America. It is further subject to the following clause, which is to be included in all bills of lading issued hereunder. USA clause paramount. This bill of lading shall have effect subject to the provisions of the carriage of goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated

herein and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

That's our contract. Weyerhaeuser and New York Navigation says that we have to sign bills of lading without prejudice to the charter party. The charter party is the paramount document.

It also provides that the charter party expressly includes all the terms and conditions of the carriage of goods by Sea Act. That brings us only to a due diligence. That's all we have to exercise. Mr. Maloof has been arguing here today that he has an absolute out and out warranty of seaworthiness. I neither agree or disagree with him because that's directed to New York Navigation. Anticipating the argument he would make that was why we would not pick up the defense of New York Navigation.

I think the Court has summed it up. I am going to be very brief. You put it wilfull, wanton misconduct. There has been no intent shown here. We are doing the best we could. I am not saying that we should get A double plus but we did try. And there is absolutely no evidence

of any intent on our part to willfully send this vessel to sea in a leaking condition. It just isn't there.

I think you.

THE COURT: Thank you, Mr. Warner.

Mr. DeOrchis.

MR. DE ORCHIS: If your Honor please, I think the first point I would like to make is that a Court of Admiralty is, first of all and last of all, a court of equity and if there was ever a case that cried out for equity on behalf of the charterer, this is it. There hasn't been any accusation anywhere in this record against the charterer in this case and Mr. Maloof frankly conceded and stated freely at the end of the trial that there was nothing that the charterer had done which was wrong in this case.

MR. MALOOF: Judge, I don't want to interrupt but that I have to correct. I said I didn't prove he had knowledge of the unseaworthiness. I did not admit he didn't know about it.

THE COURT: I won't take this to have been any admissions. I will leave it at that. I am sure that Mr. DeOrchis will go on and we will hear the argument that he wishes to present.

MR. DE ORCHIS: All of the testimony of all of the witnesses, no matter who called them, was that through

all this business about the knowledge of the leaking ship, none of it was ever brought to the attention of the charterer and secondly, everyone agreed that it was not the duty of the charterer to maintain the ship or to repair it. In fact, the charterer could not. This was not its ship.

Which brings me to the general character that -- of the charterer vis a vis the shipowner and the shipper, which we should keep in mind in a situation like this. The plaintiff in this case, and incidentally, we have two plaintiffs, one of them has lost this case because he had no business in it. Your Honor has in this case two plaintiffs. One is Iligan International Corporation and there has been absolutely no proof that Iligan has any interest in this case and you must necessarily make a judgment against them in favor of the two defendants here.

THE COURT: The contract which I am looking at, which is where we start, Exhibit 4, is between Iligan Integrated Steel Mills, Inc., a Philippine corporation, and your client. I don't know ifMr. Maloof is in a position where he wishes to concede that there is no claim stated against your client at least, maybe against the defendants, on behalf of Iligan International Corporation.

MR. MALOOF: I think Mr. DeOrchis is wasting the

Court's time. The other cause of action during the trial was already dropped. With the judge in attendance.

MR. DE ORCHIS: It was dropped after we had proven at the trial that Iligan International had no interest.

MR. MALOOF: I think that's probably Mr. DeOrchis' best point in this whole case.

THE COURT: All right, let's get on. In any event, I think I can fairly state for the record that Iligan International, Incorporated either has been or will be dismissed from the case and if, as and when a judgement, it will be rendered in favor of Iligan Integrated Steel Mills, Inc.

MR. DE ORCHIS: While we are doing some housekeeping, Iligan Integrated Steel Mills, the remaining plaintiff, was fully paid by a third party, an insurance company, who became subrogated to the rights of Iligan Integrated Steel Mills and no one has ever substituted the real party in interest in this case.

THE COURT: Is that really necessary?

MR. MALOOF: That is not true. The record discloses that they were added as party plaintiffs and we spent at least an hour and a half and then I went and got some facts and brought it back to court on another day and then they were added and it's automatically done and I hate to keep

interrupting but this is ridiculous.

THE COURT: Let's get our housekeeping in order here. I am looking at the pretrial order.

MR. MALOOF: It isn't in the pretrial order, your Honor. It was done during the trial.

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MR. DE ORCHIS: I believe he is correct, your Honor.

THE COURT: Let's pass that.

MR. DE ORCHIS: Getting to the main case, Iligan wanted to ship this steel mill to the Far East and didn't want to charter its own ships, so it came to New York Navigation Company, and this agreement was entered into, which is not a charter agreement, it is not a charter party by any stretch of the imagination. It doesn't charter any particular ships. It doesn't charter any particular cargo.

The agreement itself is an agreement to furnish, to arrange for ships or to furnish ships to carry their cargo.

It was always understood that the New York Navigation was not going to use its own ships in this case, but it was going to go out and find ships to do this job in exchange for the freight agreed upon in this contract, and the contract necessarily had attached to it a bill of lading because it says somewhere along in the contract that all other terms are in accordance with the bill of lading.

Now, the time charterer or a voyage charterer does not own a ship, cannot maintain or make it seaworthy or even go on board, without the permission of the captain, and therefore, when the time charterer goes out or the

21ze

charterer goes out to find ships, it has to protect itself to make sure that if something goes wrong in the way of a ship leaking, as in this case, that it will have an owner who will respond to it because there is nothing that a time charterer can do about a leaking ship.

So in this case the New York Navigation Company went out to charter a ship from Weyerhaeuser, it was really chartering this ship for a voyage from the East Coast to the Far East, but it deliberately did not use a voyage charter form because a voyage charter form would not have in it the express warranty of seaworthiness that New York Navigation needed in this case, and there is testimony on that in the record, why they chose the time charter form that you have before you.

Now, this time charter form has been in use for a long, long time and the Supreme Court has passed on it, the Second Circuit has passed on it and the very language that we have here in this charter party has been noted by the writers such as Gilmore and Black, and all of them are in agreement that this form of time charter gives the charterer a warranty that the ship is seaworthy.

It not only does not reduce the ordinary implied warranty that you would have in any contract, but it actually increases the duty because--look at the language it uses.

31ze

they were going to give us the good American ship JOHN WEYERHAEUSER and then it goes on that the ship must be tight, staunch, seaworthy and not only that, they have to maintain it that way at all times throughout the voyage so if anybody had a bigger bundle of rights in this case, it was not the plaintiff, it was the time charterer who had a contract which was far beyond due diligence and far beyond a simple and implied warranty.

He says, ah, but this contract has in it the paramount clause at the bottom. The paramount clause incorporates generally the Carriage Of Goods By Sea Act, so we have the simple rule applicable to all contracts that where you have specific language in one part of the contract and a general incorporation in another part of the contract, that the specific overcomes anything you might find in the general.

That's the first thing wrong with his argument.

The second thing is that the paramount clause is put in these contracts in order that the owner may be sure that in bills of lading there will be a Carriage Of Goods By Sea Act situation.

In other words, it is to be used as a right against shippers, not as a defense against the charterer. As against the charterer, he has warranted the ship and in the

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third--

THE COURT: Then he turns around, you say, and he looks to the owner, in this case Weyerhaeuser, which is supposed to furnish that type of vessel?

MR. DE ORCHIS: After we signed the agreement that you have before you as Exhibit 4, with Iligan, in which we said, we are going to go out and find you some seaworthy ships to carry your cargo.

When we did that, and went to a ship owner, we wanted to make darn sure that we were going to get a ship owner who back to back would say the same thing to us, we are going to give you a seaworthy ship, not just exercise of due diligence. That is why we chose the time charter form and not the voyage charter form. And even when you go into the Act, of course, the Act says--I mean even if it incorporated COGSA, it won't help.

Even if we incorporate COGSA, COGSA says there is nothing against the carrier increasing his liability in any way he wants. It may simply not decrease its liability. And the two cases that I rely on is the Supreme Court case which was the first one to pass on this form of charter party, which is the Luckenbach case, 248 U.S.139, in which the court stated:

"The charter of the vessel states clearly that

5 lze

the vessel, 'being, on her delivery, tight, staunch--and strong,' the owners will 'maintain her in a thoroughly efficient state in hull and machinery for and during the service,'" exactly this time charter, and they hold that this is a warranty.

"This duty to maintain the vessel in an efficient state is imposed by the contract, because a time charter, like a charter for a single voyage, is not a demise of the ship. In both, the charterer is without control over her repair and maintenance. In operations under each the charterer becomes liable to shippers without limitation for losses due to unseaworthiness discoverable by the exercise of due diligence on the part of the owners; and in each case he requires," this is the time charterer, "he requires for his protection a warranty, without limitation."

This is exactly what we did. We signed up with Iligan and then we turned around and wanted a back to back right of a warranty of seaworthiness from the owner of the ship--

THE COURT: In other words, the same warranty that you were furnishing to Iligan?

MR. DE ORCHIS: At this point in the argument because later on I want to bring up the question of whether I did actually warrant them anything.

6 lze

THE COURT: Don't skip over that because I read your contract. I read Exhibit 4 and I read New York Navigation agrees to provide--I will use the word Iligan--with a sufficient number of suitable and seaworthy vessels and I go on, I don't want to burden the record, but I am looking at the agreement.

I am looking at paragraph 1, the first numbered paragraph, and I say to you, you contractually agreed to provide Iligan with seaworthy vessels. You are now, I suggest, in a position of having warranted to Iligan that you would furnish a seaworthy vessel and if I find that the JOHN WEYERHAEUSER was not seaworthy, it would seem to me that you would be liable to Iligan and, in turn, WEYERHAEUSER would be liable to you.

MR. DE ORCHIS: That's exactly what I am arguing. The most recent case--

THE COURT: Let's go one step further.

Mr. Maloof says that the breach of warranty here, the failure to furnish a seaworthy vessel under the circumstances of this case abrogates this contract completely and basically I would like your position on whether it--your position on his claim. He has said that to us.

MR. DE ORCHIS: I not only disagree, I am sure he is wrong because the contract continued to live thereafter.

7 lze

This is like selling somebody a hundred loaves of break and one is rotten. He says now the whole contract is abrogated. It is a silly argument. At any rate, if you will look at the Dempsey Associates versus Sea Star, which is 461 Fed. 2d 1009, you have there this very clause again being taken up by the Second Circuit and finding that this is a warranty of seaworthiness under this type of time charter, and the same clause 8 about the captain being the borrowed servant of the charterer and all of that was in there and there was a breach of exercise of due diligence, and the defenses were still there.

The nature of a breach of warranty and the nature of an exercise of due diligence and of wilful and wanton misconduct, should be kept in relation to each other before the Court to see what it is, the size or seriousness of the sin being committed in the breach of contract.

In a simple breach of warranty of seaworthiness, the breach is accomplished without any knowledge, any fault, any scienter, anything. You simply give the man a ship, something is wrong with it and that's it, you have breached your contract.

Now, the law of the United States is that even if you are negligent and negligently breach your contract, you still get all your limitations under the Carriage Of Goods

8 lze

by Sea Act.

The Carriage of Goods by Sea Act says if you fail to exercise due diligence, that is a much bigger sin than simply breaching a warranty without knowledge. And, of course, now he wants to raise even above that to a stage of wilful misconduct and if we let him get away with that in this case, we are going to open the biggest Pandora's box of litigation that the Southern District Court has ever seen, because this case, while there may be a failure to exercise due diligence, it is nothing more, it is nothing less, than the everyday cargo damage case that we see in this courthouse.

Everytime a ship cover or hatch cover leaks, there is evidence about the captain knew about it, the ship owner should have done something, and it is an ordinary failure to exercise due diligence.

When you talk about a deviation, that is one thing, but this business of gros negligence is something that our Court of Appeals has taken time and time, a dim view of such cases, and has limited themselves as much as they could by saying that the captain not only had to know that he had this problem, but he had to know that he couldn't possibly have made the voyage without causing the damage.

9 lze

They don't like the theory of gross negligence because that's what they have over in France and that's why you have the ligitation that you have over there. We have tried to limit our responsibility to clear-cut areas. Either it's due diligence or it's a deviation, but a deviation is a wilful breach of contract and what you have in the circumstances of this case, you may have a captain who was negligent, you may have a ship owner who should have read log books, and seen what was going on, but you certainly don't have that kind of wilful, wanton misconduct that should break a limitation that the Congress of the United States put on the shipowner because when they went out to buy their insurance, it was based on the idea that there would be a $500 package limitation and when the shipowner went out to buy his insurance, it was with that in mind, and when we break limitations we upset the entire system of balance in the insurance industry, and this is all this is.

This is three insurance companies here arguing. Let's not kid ourselves that we represent integrated or he represents Weyerhaeuser. We all represent insurance companies and what he is trying to do here is to break a limitation, after having collected a premium based on the laws that the United States provides and that is that there is a package limitation, and that clause says that in any event,

10 lze

the $500 limitation applies, and the only exception to it is an unreasonable deviation and that word "deviation" has been stretched and stretched until it is getting to be ridiculous.

We have it in the deviation which is geographical and we have it in the deviation such as carriage of containers on deck when such carriage exposes the cargo beforehand, known to expose the cargo to an obvious peril. We have seen now in MORMACVEGA.

What I am afraid will happen, what Mr. Maloof is trying to do in this case is to try to carve out some ground somewhere between due diligence and a clear-cut deviation. He is trying to create a new ground called gross negligence where judges will have to start drawing lines where does due diligence end, where does gross negligence begin.

Where does ordinary negligence end, where does-- and this is going to be a party for lawyers, and this is why I think this is a serious case. Much more serious than it appears.

The biggest mistake made in this case was when Weyerhaeuser offered him a hundred per cent of the package limitation. From then on he figured he had nothing to lose except to try to make some new law of this type, and while this doesn't go to the merits, it goes to the public policy

11 lze

argument in this case.

Let us try to--I think cargo cases ought to be kept to where Congress put them, exercise of due diligence, and the $500 limitation. In this case COGSA was incorporated both in the bill of lading and incorporated in the charter party.

Now, another thing. I don't know how many carriers he wants. He says he is the carrier, he says I am the carrier. The Carriage of Goods by Sea Act says the word "carrier" shall include the shipowner or the charterer. And the bill of lading says the shipowner is the carrier, and as he says, it was signed for the master by us as the agent.

This is another area. I don't think your Honor is ever going to reach this in this case, but here is another area where he is trying to develop multiple carriers. I think if you find that there was a failure to exercise due diligence, then there should be a judgment here against the shipowner. If there is one against us, we should have indemnity against them. What they warranted to us was seaworthiness and this is a case for breach of seaworthiness, and we are entitled to attorney's fees.

THE COURT: Let's dwell on that for a moment. I asked the question before of Mr. Warner and I indicated

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at the time I would ask the same question of you.

In essence, what was Weyerhaeuser's undertaking here? Was it to defend any claim arising from unseaworthiness or any claim arising from lack of due diligence only?

MR. DE ORCHIS: It was my claim arising from unseaworthiness.

In these cargo cases--he says once he was a charterer and he had to pay fees and then he was an owner and he still had to pay fees and isn't this a terrible situation.

Well, that's not the way it works. In the cargo damage cases, they are pretty well defined into either damage caused by the leaking ship or damage caused by improper stowage.

The stevedores are hired by the charterer, as they were in this case. The maintenance of the ship was the problem of the shipowner. When the plaintiff sues, and he sues because he says the ship leaks, immediately that should light a bell or light a--sound a bell, which says, this is an owner's case and this is exactly how the insurance industry treats it.

THE COURT: Well, should you people have installed a better bulkhead than was in place between hatch 3 and the adjoining hatch, which we recognize here was temporary, was

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made of wood and canvas and was able to be penetrated by this wet or slurried fertilizer?

MR. DE ORCHIS: The bulkhead we have here is a bulkhead to separate cargo. It is a fence, a reinforced fence. It could have been dunnage. It could have been chocking.

THE COURT: No, but should you have put up a watertight section?

MR. DE ORCHIS: That would have meant building a cement or steel bulkhead across the ship which would have to be removed with every different type of cargo.

THE COURT: The next question from that is this: Assuming a temporary barrier, as indicated. Were you prudent in stowing this valuable steel mill machinery immediately adjacent to a cargo of fertilizer? It is a stowage question I am putting to you.

MR. DE ORCHIS: Absolutely nothing wrong with that because I don't have to assume that a pipe is going to leak down, and the cargo of fertilizer, with all due respect to the word, is just as expensive as the machinery. I have a million dollar suit on that case too. This wasn't cheap fertilizer. This was chemical--

MR. MALOOF: I object to that. Mr. De Orchis time barred South Korea, which owned that fertilizer, because

they didn't sue within one year and it wasn't worth what the steel mill was worth. And it was arbitrated and it is over with. Let's keep the record straight.

MR. DE ORCHIS: He bounces up and down like a toy.

THE COURT: Let's not have any ad hominen remarks.

You said that it was a perfectly prudent thing to stow this fertilizer in an adjacent place to what I will call valuable electrical machinery. Now, I have seen the pictures so I recognize in general terms the nature of the cargo and I just want your position, that's all. You say it was prudent to have stowed these two cargoes adjacent, one to the other, and it was not foreseeable to you as a person who would be putting the cargo into the ship in the way you did, that an accident such as this would have occurred.

MR. DE ORCHIS: We have here cases of machinery and we have bags of fertilizer. We put them together in the same hold. There is nothing in the record as to who decided to do that. I don't remember it. I don't remember that anywhere in the record whether that was decided by the master or decided by someone from the shore or decided by some of our people. But at any rate, I don't have to put cargo on a ship with the risk that it is going to leak. I put cargo on a ship on the assumption that it is not going to leak.

Now, the only cases where --

THE COURT: But you tell me we have all these cargo cases in the court where we come into a port and they are loading the stuff in the rain, in the snow, and they can't get the hatch cover closed, the cargo comes in, having been on the dock with snow all over it, comes in all wet.

So you have many cases, it would seem to me, where we have to look to the prudence of stowage.

MR. DE ORCHIS: Yes. And those cases, as your Honor will find, are always cases where the nature of one cargo is dangerous to the other cargo. Not the ship. For example, if we stow coffee next to something that smells and the smell will be absorbed by the coffee or tea, that's the kind of cases you are talking about.

If you stow leaking barrels of olives on top of cotton, that's the kind of case you are talking about.

But nowhere in the books will you find a case that says that when you stow this cargo and that cargo, I have to worry about the ship leaking as a charterer. I have a right to assume I am using a seaworthy ship warranted to me by the shipowner.

The line of cases you have in mind are there but in every case it is because one type of cargo has been stowed in a position that makes it, exposes it to another

type of cargo.

In Texas in a case that was just tried down there of this type, the judge dismissed the case against the charterer, and held only the shipowner liable in the case rather than hold the charterer liable and then have the charterer get indenity against the shipowner. He gave us the attorney's fees but he let us out completely saying that as a charterer like this, who hadn't done anything except paper work and the ship that was unseaworthy, he saw no reason for exposing this charterer to a big judgment on the books or against him, and having the hope that the owner would pay it.

THE COURT: I don't think you have a problem of hope yet. Weyerhaeuser is, to my way of thinking, and I am putting any insurance concept aside, at least as substantial as your client, and I dare say possibly more so.

MR. DE ORCHIS: I am a midget between these two giants.

THE COURT: Thank you, Mr. DeOrchis.

I indicated to you, Mr. Maloof, that at the end I would give you a couple of minutes if there is anything that you wanted to add, and I would do it now. There is one loose end here which I asked you about perhaps before you began. The charterer pointed out that although the

plaintiffs made a claim for shortage and the defendants have alwyas been ready to honor this claim upon presentation of the proper proof, the plaintiffs hadn't to date presented such proof and did not at the trial make out a prima facie case for the shortage.

It would seem to me that this is a matter which should be remedied and I don't see any reason why it could not be remedied now either by stipulation among counsel or by the plaintiffs presenting -- plaintiff presenting some appropriate documentation to support the claim for shortage. This may be a very minor matter but it does strike me, gentlemen, as a loose end in this case and I thought I would mention it before we closed today.

MR. MALOOF: I would be happy to provide the documentation to Mr. DeOrchis. He had his own private reasons for wanting it out of the trial earlier. I think it was tied in with his demand for counsel fees but certainly, I will try to do that right away.

MR. DE ORCHIS: If I may interrupt my good friend here. I said to Judge MacLean at the beginning of the trial that I had been trying since the very inception of this litigation to settle it separately, this claim for shortage. They said it was five or $6,000 but when I asked him for records, they came up with only a few

hundred dollars and even thouse were not satisfactory and I was anxious to pay that part of the claim because I did not want him to get a judgment for $900 and then hang costs on that, so I wanted it separate and I stood willing to pay and I am willing to pay and it shouldn't be in this litigation at all.

If he gives me records, the usual cargo records that we get, he is paid.

MR. MALOOF: No problem. We did prove the $6,000 under Mr. DeOrchis' interpretation it came to $900.

THE COURT: I would suggest that counsel meet on this and perhaps if you would, within the next ten days, advise the Court either that you have stipulated on the matter or present to the Court whatever you wish, both of you, and I will try at that point to incorporate that in my decision. I give you that option. Is that a reasonable suggestion?

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MR. MALOOF: I am going to be away for a week. I'd like to handle it personally, maybe two weeks might be--

THE COURT: Is the general concept satisfactory to both of you?

MR. WARNER: I don't think I am involved in this.

THE COURT: I wouldn't think you are. This could be handled if Mr. Maloof and Mr. DeOrchis are agreeable, I would prefer you do it by a stipulation. Meanwhile I will be working on the overall decision. If you can't stipulate, just present your respective proof and I will reach some conclusion thereon. It seems quite minor in the context of the whole case, and I wouldn't want the end of the tail to be wagging the dog. I will hear from you then, both of you, or one of you, on behalf of both of you, relative to the shortage matter, either by your having presented to me a stipulation which will basically take it out of the case, and I could so order it, or it could be added to a decision which I would render, and if you can't agree on something of that nature, my other suggestion would be just present your proof and I will determine it and add it at the end of the opinion or at some appropriate place in the opinion.

MR. DE ORCHIS: Your Honor said "present your

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proof." The proof in this case has been presented. The record is there and the trial is closed. I am perfectly willing to settle this thing on the side with him, but I think the record is clear that he failed to prove his case on the shortage.

Nevertheless, I am making my offer.

THE COURT: At the moment I would suggest that that may well be a technical fact, and I would prefer, needless to say, since this is apparently a minor matter, to have you meet on it and hopefully reach an agreement, which would take it out of the case as such. If you would do that, I'd appreciate it. Do what you can, report to me, if you would, two weeks from today.

MR. MALOOF: In behalf of plaintiff, we will do all we can do along those lines.

THE COURT: The report I suggest be in two weeks from today, can be in the form of a written communication to the court, either signed by both of you or sent by one of you with full knowledge, notice, and copy to the other, as you see fit. Let me hear whatever else you want to add at thispoint, Mr. Maloof.

MR. MALOOF: I just have a couple of comments in regard to Mr. Warner's talk, because it is the same as the trial when they tried to put a witness on on rebuttal

and Judge McLean said "But there is no need for rebuttal," so I couldn't even put the witness on. We talked about ballasting from Madras to Portland. Number 3 was never used for ballasting. Your Honor can imagine the free surface effect which would have come about if you filled a double hold with seawater. The ship would have sunk in the middle of the Pacific. You will notice that they were using other holds.

Frankly, I think that's a dangerous procedure also. But number 3 was not involved with ballast, and the records show that. There is just one other point.

In all of my remarks on the cause of this water, I have not given my own interpretation at all. I have given the interpretation of Captain Dumble, Mr. Mandle, Mr. Baumgartner and Captain deBouthillier. They are quarreling with Mr. Warner and Mr. DeOrchis.

Nobody of the witnesses mentioned snow as a cause of this water. There is one more item. The trouble with all of the proof that they didn't know what caused the loss, the proof is that it was the valve all the time, and Judge McLean in his summation after the trial, was very impressed with the fact that it was a progressive failure, so it could have been a little bit of a leak which--but the evidence of the necessary pumping that had to be done, it

just came full apart just when they put the 7,000 tons of fertilizer aboard inTampa.

It was a small leak which got worse and worse and worse. As far as the refuse from sanitation, it wouldn't come through a hairline crack in a pipe. Just a little dribble of urine, if he wants to get into that, but nothing else. On New York Navigation, this is a kind of different ballgame, your Honor. Mr. DeOrchis spent a lot of time proving that he did nothing. He had two warranties to satisfy: an express warranty for seaworthy ship on December 11 when he provided the ship and an implied warranty given by law as of December 16 when the ship sailed, but he proudly said, "We did nothing." That is certainly a non-delegable duty.

Number two, he had a surveyer aboard, and he proved that he didn't even--excuse me. In his cross examination of Mr. Mandle, he made the point that New York Navigation's surveyer at Baltimore didn't look at the clapper valve. This is a company which warranted the seaworthiness of the vessel.

THE COURT: You are saying that the failure to examine this apperture in the hull would raise to the level of gross negligence, wilful, wanton conduct, or you are saying that the failure to have your surveyer do that would

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in essence be simple negligence?

MR. MALOOF: I am saying that to give an express warranty of seaworthiness and do nothing, is at the least gross negligence.

THE COURT: I find it to be negligence.

I have some difficulty going further than that, and I will obviously consider your point.

MR. MALOOF: I ask your Honor to hold that it is a fundamental breach of this contract.

MR. DE ORCHIS: If your Honor please, may I have just one word?

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THE COURT: Let Mr. Maloof finish, make a note, and when--

MR. DE ORCHIS: I thought he was finished.

THE COURT: I don't know that he has. Then I will let you have your one word and then we will conclude.

MR. MALOOF: I will try to be brief because we have really taken much of your Honor's time on this.

THE COURT: It is an important matter, as I said at the outset.

MR. MALOOF: New York Navigation argues that this bill of lading incorporated the Carriage of Goods by Sea Act as a contractual provision, and therefore, it argues that the express warranty comes down to a duty to exercise due diligence. But, a study of the documents shows that this cannot be so. The clause number 1 that your Honor has already noticed, is the express warranty to provide a seaworthy vessel. Then, after the recitation of many other provisions, and in clause number 11, the agreement says, "In all other respects the loading and transportation herein shall be performed in accordance with New York Navigation's standard bill of lading."

This means the only thing in this case is the express warranty of seaworthiness, not any due diligence as regards Mr. DeOrchis. It is not satisfied either by

the ignorance of the condition. It is an absolute warranty something that Iligan had a right to rely on. That was broken on December 11. It was never repaired. It was just broken.

The implied warranty of December 16 was also broken. The law is, even if he had a limitation, which could cut down the express warranty, the law is that you do not have limitations when you break an implied warranty, contractually.

I would like to refer your Honor to Carver Carriage by Sea, first cited by Mr. DeOrchis, 12th edition, volume 1, this is volume 2 of the British Shipping Laws, page 110, 111, and then bottom of pages 305 and 357, which bear out the comments I have just made.

Again the Carriage of Goods by Sea Act, in its own terms, covers only a carrier. If you read this bill of lading, you will see that New York Navigation is not a carrier in this case. It does issue the bill of lading. Its own standard bill of lading, as it calls it, said between a carrier. The carrier is the ship, the shipowner, demurrage charterer, time charterer. Not voyage charterer. While this was a time charter form, the period of time was scratched out. This is a charter for one voyage. So it is not a carrier. He is a simple marine contractor who

broke two warranties. He has nothing else. He owes Iligan over $2,000,000 as a result. I think I probably have covered some of these points faster than I wanted to, but out of respect for your Honor, thank you so much for being so patient. We ask for a judgment for a full amount of damages in favor of Iligan, with interest from the date of the bill of lading. I do offer to your Honor a case, which is not in plaintiff's brief, it is an English case which I know you will find of interest, It is called Harbutt's Plasticine Limited, and at the same time, I give a copy to the other attorneys.

Thank you, sir.

THE COURT: Thank you, Mr. Maloof. I did indicate to Mr. DeOrchis, if he had something he wished to say, he could say it now. If its all been covered, then we will close this hearing.

MR. DE ORCHIS: There was one point your Honor made at the very beginning, I made a note and maybe your Honor is fully aware of this, but you brought up the question of the stuck clapper valve and how long had the clapper valve been stuck, and so on.

Whether the clapper valve was stuck or not, or even if it wasn't there at all, has nothing to do with the leak in this case.

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It wasn't the proper valve that caused the leak, it was the hole that developed in the body of the clapper valve. If the clapper valve was wide open, stuck in an open position and the ship goes below the waterline, that isn't going to let the water into the ship. It just lets water into the lines. What caused the leak here was corrosion in the elbow of the body which held the clapper valve.

THE COURT: It is really a combination of two things, because it seems to me when the ship was fully laden and the appurture which would have been covered by the clapper valve was under water, a greater quantity of water would have pushed in to the vessel and probably would have caused a considerably greater flow through the hole.

In other words, if the clapper valve operated properly, the only flow that would have developed through the hole, as I see it, would have been the flushing on an occasional basis from the head; whereas with the clapper valve open, you have in addition to that, the outside water, the seawater, coming into the vessel and adding to the leakage through the hole which apparently did develop in the elbow of the valve. You follow me?

MR. DE ORCHIS: Yes.

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THE COURT: It is a question of rate and flow.

MR. DE ORCHIS: That would go to the extent of the damage.

THE COURT: It would mean that more water--by my standard, it would mean that more water, a greater quantity of water, under greater pressure, probably, would be forced through the small hole in the valve. You follow me?

That's the only point.

MR. DE ORCHIS: Yes. What concerns me is that your Honor has indicated he is going to find a lack of due diligence, at least at this point you feel that way. You may change your mind.

THE COURT: My question may not be all directed in one place. I asked questions of each counsel with the idea of probing, because I have some open points in mind.

MR. DE ORCHIS: The evidence was that the corrosion took place from inside the valve out, as it usually does in this kind of case. Seawater passing through the valve inside at the corner is where she corrodes, and that's where they developed the hole we see. It is not the sort of thing that is going to show from the outside until the leak develops.

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THE COURT: That's correct.

MR. DE ORCHIS: Somewhere in the record you are going to have to find evidence that it was leaking before Baltimore, because in order to exercise due diligence, in order for the captain to have seen that this valve needed repairing, somebody should have seen a leak. I suggest that this record is barren of any evidence that this valve leaked before Baltimore and therefore if she didn't leak how could you have exercised due diligence about it?

THE COURT: Certainly you don't have anybody who says "I saw it leaking, I saw it dripping."

I recognize that. Mr. DeOrchis, your adversary, Mr. Maloof, argues, as I recall his argument, that they should have been aware of this based on other things, to wit, the depth of water in the billings, that's the first example that comes to mind.

He also went on to say at one point in his argument that this corrosion could only have occurred over a period of time and that a hole of this dimension, it wasn't the largest of holes, obviously it was measured in fractions of an inch, that a hole of this dimension could only have corroded through a piece of metal over a period of time.

I am asked by the plaintiff to draw certain

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inferences from the ultimate physical appearance of the valve. I will try to think this thing through along the lines which Mr. Maloof has argued this afternoon, and I will be mindful of what you have said just now, what you said earlier and what Mr. Warner said relative to the inspection at Portland relative to the condition of the ship as it progressed around from Portland to the East Coast and then made its final--final for all purposes--but for our purpose its final voyage. I think I have the picture. All of you presented it very well. Is there anything else any of you would like to add before we conclude?

MR. MALOOF: Your Honor, I think you mentioned the hole was fractions of an inch.

THE COURT: Three quarters of an inch, or something like that?

MR. MALOOF: This hole was one and a quarter inch by four inches. That's the testimony in the record. Four inches long. We are lucky the pipe was still there.

THE COURT: You made note of it now and we have it before us. All parties having presented their final arguments, the Court reserves decision. I will await from Mr. Maloof and Mr. DeOrchis within the next 14 days, the next two weeks, either a stipulation or proof from each of you regarding this very minor matter of shortage,

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and following my receipt of either a stipulation or proof from you, I will try within a very short time thereafter to file my opinion in this case.

Thank you very much, gentlemen.

MR. MALOOF: Just one point, your Honor. I have not briefed too carefully the point about the implied warranty that I made today, because I got the lead from that particular law from Carvers, which was referred to by Mr. DeOrchis, but it is good law and it affects this case.

I hate to burden you with more brief. Can I just write a letter on that point?

THE COURT: When could you do that? Obviously I'd want a copy sent to the other side, I'd like to give them an opportunity to respond within an equal period of time.

Tell us when you could get such a letter to the Court?

MR. MALOOF: I will be away until the 18th, Perhaps I could ask someone else to handle that point so it doesn't hold your Honor up and get it to you within ten days.

THE COURT: I will permit counsel, if they wish, to make any response to Mr. Maloof's letter on this subject

to respond five days thereafter. Is that satisfactory, gentlemen?

MR. WARNER: Yes.

THE COURT: On this one point. So that we bring everything into context, I will expect to hear from you in 14 days on the shortage matter and the final day for hearing from you, that is from the defendants on this legal point, to the extent you wish to respond will be one day thereafter, or 15 days from today.

Is that satisfactory?

MR. MALOOF: Thank you, sir.

MR. WARNER: Yes.

THE COURT: That would put it on a Friday, and I should then have everything from you that you are going to present to me by Friday, the 22nd of February at 5 p.m.

Court reserves decision, and I thank you very much.

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